



UNITED STATES ENVIRONMENTAL PROTECTION AGENCY
WASHINGTON, D.C. 20460

EXTERNAL CIVIL RIGHT COMPLIANCE OFFICE
OFFICE OF GENERAL COUNSEL

June 21, 2021

In Reply Refer to:

EPA Complaint No. 01R-21-R9

Jack P. Broadbent
Chief Executive Officer/Air Pollution Control Officer
Bay Area Air Quality Management District
375 Beale Street
Suite 600
San Francisco, CA 94105
jbbroadbent@baaqmd.gov

Re: Preliminary Findings for EPA Complaint No. 01R-21-R9

Dear Mr. Broadbent:

This letter is to notify you that, pursuant to 40 C.F.R. § 7.115(c)(1), the U.S. Environmental Protection Agency's (EPA) External Civil Rights Compliance Office (ECRCO) is issuing preliminary findings within the 180-day regulatory timeframe and closing, as of the date of this letter, EPA Administrative Complaint No. 01R-21-R9 ("Complaint") filed against the Bay Area Air Quality Management District ("BAAQMD") and received by the EPA on November 30, 2020.¹ The Complaint was filed by CALifornians for Renewable Energy, Inc. ("Complainant") and it alleges that BAAQMD discriminated against the historically Black community of the Bayview and Hunters Point neighborhoods, on the basis of race in violation of Title VI of the Civil Rights Act of 1964 ("Title VI"), and EPA's nondiscrimination regulation, at 40 C.F.R. Part 7.

Consistent with the requirement in 40 C.F.R. § 7.115(c)(1), ECRCO herein sets forth preliminary findings.² ECRCO has concluded its investigation as to whether BAAQMD discriminated against the residents of the historically Black neighborhoods of Bayview and Hunters Point on

¹ Complainant also filed this complaint against San Francisco Department of Public Health (SFDPH). ECRCO rejected the complaint against SFDPH due to lack of jurisdiction, as SFDPH is not an applicant for, or recipient of, EPA financial assistance.

² See Case Resolution Manual provision Section 5.1 (Jan. 2021) (https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf).

the basis of race in violation of Title VI of the Civil Rights Act of 1964 (Title VI) and EPA's nondiscrimination regulation found at 40 C.F.R. Part 7, in its response to an air quality complaint and Title VI complaint involving an alleged release of naturally occurring asbestos ("NOA") during soil disturbance work at Parcel A, formally part of the Hunters Point Naval Shipyard. As to this issue, ECRCO finds insufficient evidence to support a finding of discrimination on the basis of race in violation of Title VI.

ECRCO has also concluded its investigation as to whether BAAQMD has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to BAAQMD's services, programs, and activities, for individuals with limited English proficiency (LEP) and individuals with disabilities and whether BAAQMD has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7. As to this second issue, ECRCO has determined that BAAQMD failed to comply with some of its obligations under the federal nondiscrimination laws and EPA's nondiscrimination regulation to have and implement a nondiscrimination program.

ECRCO Authority

ECRCO is responsible for enforcing several federal civil rights laws that prohibit discrimination on the bases of race, color, national origin (including limited-English proficiency), disability, sex, and age in programs or activities that receive federal financial assistance from the EPA. Pursuant to EPA's nondiscrimination regulation, ECRCO conducted a preliminary review of the Complaint to determine acceptance, rejection, or referral to the appropriate Federal agency. *See* 40 C.F.R. § 7.120(d)(1).

Complaint Background and Summary of Conclusions

On June 24, 2020 Complainant was contacted by community members who reported that on or around June 16, Lennar Construction ("Lennar"), a development company, created soil disturbances at Parcel A. Parcel A is a piece of land formerly part of the Hunters Point Navy Shipyard, in the Southeast corner of San Francisco, California.³ On the same day, Complainant contacted Jeremy Kimball, a Supervising Air Quality Specialist at BAAQMD to discuss the soil disturbance. Mr. Kimball directed Complainant to BAAQMD's air pollution complaint link.⁴ On June 24, 2020, Complainant filed a complaint using that link. In this complaint, Complainant described his contact with a BAAQMD employee earlier that day and stated, "[t]his is a complaint under Title VI of the Civil Rights Act for BAAQMD's failure to enforce compliance regarding the release of NOA."⁵

³ EPA Complaint No. 01R-21-R9 against BAAQMD, filed with ECRCO (November 25, 2020) [hereinafter Complaint].

⁴ Complaint, Exhibit 2: Email from Complainant to BAAQMD, p. 29-30, *see also* BAAQMD's Air Pollution Complaint Link, available at <https://permits.baaqmd.gov/PublicForms/ComplaintWizardSelection>.

⁵ Complaint, Exhibit 10: Air Quality and Title VI Complaint filed by Complainant with BAAQMD, p. 101-104. (November 25, 2020).

BAAQMD Senior Inspector Simon Winer conducted the investigation of the complaint. According to BAAQMD's official Complaint Report, dated June 30, 2020, Mr. Winer visited Parcel A on June 25, 2020 and reported no activity.⁶ As a result, the complaint allegations of dust disturbance could not be confirmed.⁷ BAAQMD's Complaint Report notes that Mr. Winer contacted Complainant on June 25, 2020 after his visit to Parcel A. The Complaint Report notes that the Complainant specifically requested evidence of BAAQMD's compliance with the Asbestos Dust Mitigation and Fugitive Dust Control Plan ("ADMP").⁸ On July 1, 2020, Mr. Winer followed up with Michael Hochstoecker of Lennar to discuss.⁹

Complainant contacted Mr. Winer again on September 14, 2020 asking him to visit Parcel A to ensure compliance with the "mitigation and monitoring program" that BAAQMD has in place and to check whether there were ongoing soil disturbance activities.¹⁰ On September 15, 2020 Mr. Winer responded to Complainant via phone and left a voicemail. On the same day, Complainant followed up with Mr. Winer via email asking to verify the message. In his email to Mr. Winer, Complainant wrote "You confirmed that there's soil disturbance activities going on at the shipyard, correct? You can confirm that the adopted mitigation and monitoring program is being followed, correct?" Within the hour, Mr. Winer followed up via email stating that he visits Parcel A "a few times a week."¹¹ During that period of time, Winer reported that Lennar had been working with an excavator sporadically and "they have active water truck support if there is any use of the machinery [that could potentially cause dust]".¹²

According to the Complaint filed with ECRCO, the Complainant never raised Title VI issues with Mr. Winer after the investigation of his complaint with BAAQMD began.¹³ BAAQMD confirmed that BAAQMD's Non-Discrimination Coordinator was never notified about receipt of the Complainant's Title VI complaint; the Title VI complaint was not processed through the grievance procedure BAAQMD established to process complaints of discrimination in BAAQMD's programs or activities; and, as a result, the Complainant never received a determination from BAAQMD about his June 24, 2020 Title VI claim.¹⁴

⁶ Complaint, Exhibit 10-11 BAAQMD Official Complaint Report, p. 106; and *see also* Complaint Exhibit 5: Email exchanges between Complainant and BAAQMD, p. 36.

⁷ Complaint, Exhibit 10-11 BAAQMD Official Complaint Report, p. 106.

⁸ Asbestos Dust Mitigation and Fugitive Control Plan (ADMP), the ADMP was prepared pursuant to California Code of Regulations Title 17 (17 CCR) Section 93105, the ATCM, for Construction, Grading, Quarrying, and Surface Mining Operations. It also incorporates requirements from Bay Area Air Quality Management District (BAAQMD) Regulation 2, Permits and BAAQMD Regulation 6, Particulate Matter and Visible Emissions [hereinafter ADMP].

⁹ Complaint, Exhibit 10-11 BAAQMD Official Complaint Report, p. 106.

¹⁰ Complaint, Exhibit 5: Email exchanges between Complainant and BAAQMD, p. 36.

¹¹ *Id.*

¹² *Id.*

¹³ On December 9, 2020, ECRCO interviewed Complainant. During the interview, Complainant confirmed that the Complaint contained a full record of his correspondence with BAAQMD [hereinafter Complainant Interview].

¹⁴ On January 28, 2021, ECRCO interviewed BAAQMD employees Brian Bunger, John Chiladakis, and Todd Gonsalves. Mr. Chiladakis confirmed that the complaint was not processed through the nondiscrimination grievance procedure.

On November 25, 2020, the Complainant filed a Title VI Complaint against BAAQMD with EPA's ECRCO. The Complaint states that in "failing to identify possible risks of exposure to toxins, including asbestos and radionuclides" BAAQMD and SFDPH "failed to mitigate and monitor the surrounding community's exposure to dust disturbances in Parcel A thereby subjecting persons in Hunters Point San Francisco California ZIP Code 94124 to discrimination based on race and color."¹⁵ The Complaint further states that the "exposure of radiation and toxins from Parcel A raises the risk of harm, injuries, and illnesses to the surrounding community."¹⁶ The Complaint requests that BAAQMD come into "voluntary compliance" with their monitoring of Parcel A.¹⁷ ECRCO contacted Complainant on December 9, 2020 to clarify the allegations and information provided in the complaint. As a result of that conversation, on December 22, 2020 ECRCO accepted the Complaint for investigation and issued notice to both the Recipient and the Complainant that ECRCO would investigate the following issues:

1. Whether BAAQMD discriminated against the residents of the historically Black neighborhood of Hunters Point¹⁸ on the basis of race in violation of Title VI of the Civil Rights Act of 1964 (Title VI) and EPA's nondiscrimination regulation found at 40 C.F.R. Part 7, in its response to an air quality complaint and Title VI complaint involving an alleged release of naturally occurring asbestos during excavation work at Hunters Point Naval Shipyard¹⁹ Parcel A²⁰.
2. Whether BAAQMD has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to BAAQMD's services, programs, and activities, for individuals with limited English proficiency (LEP) and individuals with disabilities, and whether BAAQMD has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7²¹

¹⁵ Complaint, p. 100.

¹⁶ Complaint, p. 6.

¹⁷ *Id.*

¹⁸ ECRCO analyzed the Bayview and Hunters Point neighborhoods.

¹⁹ Parcel A was part of the Navy's former shipyard. EPA has removed Parcel A from being part of the Hunters Point Naval Shipyard Superfund site on the National Priorities List of contaminated sites (or Superfund list).

²⁰ Title VI of the Civil Rights Act, 42 U.S.C. 2000(d) *et seq.* (prohibiting discrimination on the basis of race, color or national origin); 40 C.F.R. Parts 5 and 7. *See also* U.S. EPA, Chapter 1 of the U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit: Chapter 1, transmittal letter, and FAQs, at https://www.epa.gov/sites/production/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf. (2017).

²¹ *See* Title VI, 42 U.S.C. 2000(d) *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a). *See also* U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf); U.S. EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 FR 14207 (March

ECRCO has concluded its investigation with respect to both issues.²² With respect to the first issue, ECRCO has determined that there is insufficient evidence to support a finding of discrimination by BAAQMD. ECRCO specifically looked at whether BAAQMD subjected the predominantly Black residents of the Bayview Hunters Point community to disparate treatment and/or disparate impact in its response to the Complainant's June 24, 2020 air quality complaint.

In reaching this decision, ECRCO reviewed the Hunters Point Shipyard Parcel A Asbestos Dust Mitigation and Fugitive Dust Control Plan ("ADMP")²³; BAAQMD Regulations²⁴; California laws;²⁵ BAAQMD's publicly available documents;²⁶ fact sheets²⁷ and surveys²⁸ pertaining to Parcel A. ECRCO further examined whether BAAQMD followed its own procedures and state regulations in its response to the June 24, 2020 Complaint.

ECRCO also conducted interviews with the Complainant by telephone²⁹ and examined evidence and information submitted by the Complainant, including Complainant's written exchanges with BAAQMD and BAAQMD's response to his June 24, 2020 Complaint.³⁰ In addition, ECRCO interviewed BAAQMD legal counsel and staff and examined evidence and information submitted by BAAQMD in its response to the Complaint. Finally, ECRCO consulted with EPA Region 9 staff regarding environmental issues raised in the complaint (e.g., air quality monitoring, previous Superfund work at Parcel A, and information about NOA).

With respect to the second issue, ECRCO has determined that the preponderance of the evidence supports a conclusion that BAAQMD failed to comply with some of its longstanding obligations under the federal nondiscrimination laws and EPA's nondiscrimination regulation to have and

21, 2006) (available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_public_involvement_guidance_for_epa_recipients_2006.03.21.pdf); U.S. EPA, Procedural Safeguards Checklist for Recipients, at https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf (rev. Jan. 2020) (which provides a more detailed explanation of nondiscrimination obligations and best practices); U.S. EPA, Disability Nondiscrimination Plan Sample, at https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf. (2017).

²² Acceptance Letter, EPA Complaint No. 01R-21-R9.

²³ Hunters Point Shipyard Parcel A Asbestos Dust Mitigation and Fugitive Dust Control Plan, available at https://www.sfdph.org/dph/files/EHSdocs/ehsHuntersPointdoc/Article31/HPS_Dust_Control_Plan_2015.pdf [hereinafter ADMP].

²⁴ Bay Area Air Quality Management District (BAAQMD) Regulation 2, BAAQMD Regulation 6, Particulate Matter and Visible Emissions, BAAQMD Regulation 11.

²⁵ California Code of Regulations (CCR) Title 17, Section 93105, the Asbestos Airborne Toxic Control Measure (ATCM) for Construction, Grading, Quarrying, and Surface Mining Operations [hereinafter ATCM].

²⁶ Naval Facilities Engineering Command, Final Environmental Impact Statement for the Disposal and Reuse of Hunters Point Shipyard, available at: https://www.bracpmo.navy.mil/content/dam/bracpmo/california/former_naval_shipyard_hunters_point/pdfs/all_documents/environmental_documents/nepa/hps_200003_fseisvolume1.pdf.

²⁷ Environmental Protection Agency, Bayview Hunters Point's Parcel A is Suitable for Residential Use, United States Environmental Protection Agency Fact Sheet, November 2020 (November 2020), available at <https://semsub.epa.gov/work/09/100022040.pdf> [hereinafter Parcel A Fact Sheet].

²⁸ Bayview-Hunters Point: Area B Survey (2010), available at: https://bvoh.org/wp-content/uploads/2017/07/BVHP_Historical-Context.pdf [hereinafter Area B Survey].

²⁹ ECRCO interview with Complainant, *supra* note 13.

³⁰ Complaint.

implement a nondiscrimination program, including: procedural safeguards required under 40 C.F.R. Parts 5 and 7; and policies and procedures for ensuring meaningful access to BAAQMD's services, programs, and activities for individuals with LEP and individuals with disabilities.

ECRCO's investigation included interviews with the Complainant, to obtain information about his interactions with BAAQMD regarding his documented allegations and to provide information to the Complainant on the investigation process.³¹ ECRCO met with BAAQMD legal counsel and staff on January 28, 2021 to provide information about the investigation, the complaint resolution processes, and to provide a copy of ECRCO's Procedural Safeguards Checklist.³² During this conversation, ECRCO also offered to engage in informal resolution discussions. BAAQMD informed ECRCO of its decision to decline informal resolution in its response to the Complaint via email on February 17, 2021.³³

ECRCO conducted a review of BAAQMD's website to investigate BAAQMD's implemented nondiscrimination program and procedures. ECRCO met with BAAQMD again on March 10, 2021 to review and discuss BAAQMD's nondiscrimination program in light of ECRCO's Procedural Safeguards Checklist and to provide BAAQMD with guidance on how to remedy any areas that appeared to be in noncompliance with federal nondiscrimination laws and EPA's nondiscrimination regulation.³⁴ Finally, on April 26, 2021 ECRCO met with Veronica Eady, BAAQMD's Senior Deputy Executive Officer of Policy & Equity, John Chiladakis, BAAQMD's Acting Nondiscrimination Coordinator, Todd Gonsalves, BAAQMD's Legal Counsel, and Kristen Law, BAAQMD's Manager of Community Engagement and Policy.³⁵ ECRCO again discussed observed deficiencies and provided technical assistance to BAAQMD regarding its nondiscrimination program. BAAQMD acknowledged ECRCO's concerns and discussed potential future initiatives and actions that might address some of ECRCO's concerns, but again declined to engage in the informal resolution agreement process. At that time and again on May 10th and 25th 2021, ECRCO requested documentation regarding any such plans, initiatives, and actions.³⁶ To date, BAAQMD has not responded to any of these specific requests.

Background on the Bayview Hunters Point Community

The Bayview and Hunters Point neighborhoods are a part of one of San Francisco's oldest and most historic residential and industrial districts.³⁷ The Bayview Hunters Point Community is located within zip codes 94124 in the City of San Francisco. The Bayview Hunters Point Community is a roughly 2,528-acre collection of multiple neighborhoods located on the southeast corner of the San Francisco, including Hunters Point, India Basin, Bayview, Silver Terrace, and Bret Harte, as well as extensive industrial districts in the Islais Creek Estuary (Oakinba and Northern Gateway) and South Basin areas.³⁸ The Bayview Hunters Point

³¹ ECRCO interview with Complainant, *supra* note 13.

³² Procedural Safeguards Checklist for Recipients, Federal Non-Discrimination Obligations and Best Practices (Revised January 2020). (https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf).

³³ Email from BAAQMD to ECRCO, February 17, 2021.

³⁴ ECRCO conference call with BAAQMD, March 10, 2021.

³⁵ ECRCO conference call with BAAQMD, April 26, 2021.

³⁶ ECRCO Email to BAAQMD, May 10, 2021 and May 25, 2021.

³⁷ Area B Survey, p. 3.

³⁸ *Id.*

Community boundaries are generally understood to be Cesar Chavez Boulevard to the north, San Francisco Bay to the East, the Bayshore Freeway (U.S. Highway 101) to the west, and Candlestick Hill to the south.³⁹

As part of its investigation, ECRCO reviewed demographic information for the Bayview Hunters Point Community. The Bayview Hunters Point Community has a total population of approximately 35,437. In zip code 94124, the population is approximately: 12% White, 27% Black; 25% Hispanic; and 36% Asian.

With respect to persons with limited English proficiency, the Bayview Hunters Point Community has a total of 10,312 persons 5 years or older who speak English less than very well. In the Bayview and Hunters Point neighborhoods 30.6% of the total population is LEP. Air District is tasked with regulating stationary sources of air pollution in the nine counties that surround San Francisco Bay: Alameda, Contra Costa, Marin, Napa, San Francisco, San Mateo, Santa Clara, southwestern Solano, and southern Sonoma counties. Of the total population in these nine counties, the most prominent LEP languages are Spanish (526,619 LEP persons or 7.5% of the total population), Chinese (284,706 LEP persons or 4.1%), Vietnamese (103,246 LEP persons or 1.5%), and Tagalog (86,678 LEP persons or 1.2%).⁴⁰

Currently there are no reported major source air permits, intermediate synthetic minor source air permits, and permitted construction air emission sources (any other relevant pollution sources) located within the Bayview Hunters Point Community.⁴¹

Background of Hunters Point Navy Shipyard Parcel A

The former Hunters Point Navy Shipyard is in the Bayview and Hunters Point neighborhoods of San Francisco.⁴² The shipyard operated from 1939 to 1974. From 1946 to 1969, the Naval Radiological Defense Laboratory and its predecessors operated there.⁴³ The Navy's activities contaminated shipyard soil and groundwater, as well as surface water and sediment in the San

³⁹ *Id.*

⁴⁰ U.S. Census Bureau, American Community Survey data (2014-2019 estimates).

⁴¹ Permit Compliance System (PCS) and Integrated Compliance Information System (ICIS) databases in Envirofacts regarding facilities registered with the federal enforcement and compliance (FE&C). *See* <https://www.epa.gov/enviro/pcs-icis-search>

⁴² EPA, Bayview Hunters Point's Parcel A, Fact Sheet (November 2020) at <https://semsub.epa.gov/work/09/100022040.pdf>.

⁴³ Bayview Hunters Point's Parcel A is Suitable for Residential Use, United States Environmental Protection Agency Fact Sheet, November 2020, states, "In the Navy's 2004 Historical Radiological Assessment (HRA), the Navy presents available historical information regarding radiological activities and related Navy investigations. Preparing the HRA involved reviewing historical records, maps and photographs; reviewing previous work performed; and interviewing former Navy shipyard workers. At Parcel A, the only historical radiological concerns the Navy identified were Buildings 322, 816, and 821. Building 322 was identified because the Naval Radiological Defense Laboratory used this building before the Navy had relocated it from another area on the shipyard. Buildings 816 and 821 were identified because the Naval Radiological Defense Laboratory operated a high-voltage accelerator laboratory and x-ray facility inside these buildings. As summarized in the HRA, the Navy investigated and cleared all three buildings for unrestricted use, and it demolished and removed Building 322."

Francisco Bay.⁴⁴ Historically, the Navy used Parcel A for residential and administrative purposes, including offices and an officers' club.⁴⁵

In the early 1990s, the Navy performed routine cleanup activities to prepare Parcel A for transfer to the Office of Community Investment and Infrastructure (OCII). The Navy and EPA determined no further action was needed at Parcel A to protect public health. As such, in 1999, EPA removed Parcel A from being part of the Hunters Point Naval Shipyard Superfund site on the National Priorities List of contaminated sites (or Superfund list). Before the Navy transferred the property to the OCII⁴⁶ in 2004, the Navy, EPA, and the state agreed the land was suitable for residential use. Parcel A's redevelopment began in 2006. Developers removed all Navy-era utilities, which included sewer lines and maintenance holes.

In 2019, the California Department of Public Health ("CDPH") conducted a radiological health and safety surface scan of Parcel A. CDPH also collected radiological dust wipe samples in over 70 residential homes and studios in Parcel A. According to CDPH, the goal of the scan was to ensure residents are not exposed to unsafe levels of radiation. The scan concluded in the summer of 2019, and CDPH stated that there are no radiological health concerns throughout Parcel A.⁴⁷

I. Preliminary Findings for Issue Number One

Whether BAAQMD discriminated against the residents of the historically Black neighborhood of Hunters Point⁴⁸ on the basis of race in violation of Title VI of the Civil Rights Act of 1964 (Title VI) and EPA's nondiscrimination regulation found at 40 C.F.R. Part 7, in its response to an air quality complaint and Title VI complaint⁴⁹ involving an alleged release of naturally occurring asbestos during excavation work at Hunters Point Naval Shipyard⁵⁰ Parcel A⁵¹.

Applicable Legal Standards

EPA's investigation was conducted under the authority of the federal civil rights laws, including Title VI of the Civil Rights Act of 1964, and EPA's nondiscrimination regulation (40 C.F.R. Parts 5 and 7) and consistent with EPA's Case Resolution Manual.⁵²

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ The Office of Community Investment and Infrastructure is a state-authorized local entity serving as the successor to the former San Francisco Redevelopment Agency, <https://sfocii.org>.

⁴⁷ Parcel A Fact Sheet.

⁴⁸ ECRCO analyzed the Bayview and Hunters Point neighborhoods.

⁴⁹ Note: ECRCO's investigation of BAAQMD's response to Complainant's Title VI complaint filed with BAAQMD June 24, 2020 will be evaluated in Section II of this Preliminary Findings letter.

⁵⁰ Parcel A was part of the Navy's former shipyard. EPA has removed Parcel A from being part of the Hunters Point Naval Shipyard Superfund site on the National Priorities List of contaminated sites (or Superfund list).

⁵¹ Title VI of the Civil Rights Act, 42 U.S.C. 2000(d) *et seq.* (prohibiting discrimination on the basis of race, color or national origin); 40 C.F.R. Parts 5 and 7. *See also* U.S. EPA, Chapter 1 of the U.S. EPA's External Civil Rights Compliance Office Compliance Toolkit: Chapter 1, transmittal letter, and FAQs, at https://www.epa.gov/sites/production/files/2020-02/documents/toolkit_ecrco_chapter_1-letter-faqs_2017.01.18.pdf (2017).

⁵² Case Resolution Manual (Jan. 2021) (https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf).

Federal civil rights laws and EPA's implementing regulation prohibit recipients from intentionally discriminating in their programs and activities based on race, color or national origin, disability, sex or age. This is referred to as *disparate treatment*.⁵³ The regulation, at 40 C.F.R. § 7.35(a), states that "a recipient shall not on the basis of race, color, or national origin provide a person any service, aid, or other benefit that is different, or is provided differently from that provided to others under the program or activity."

In investigating intentional discrimination under Title VI, EPA must determine whether a recipient intentionally treated individuals differently or otherwise knowingly caused them harm because of their race, color, or national origin. Intentional discrimination requires a showing that a "challenged action was motivated by an intent to discriminate."⁵⁴ Evidence of "bad faith, ill will or any evil motive on the part of the [recipient]" is not necessary.⁵⁵ Evidence in a disparate treatment case must generally show that the recipient was not only aware of the complainant's protected status, but that the recipient acted, at least in part, because of the complainant's protected status.⁵⁶ EPA will evaluate the "totality of the relevant facts" to determine whether intentional discrimination has occurred.⁵⁷ Direct proof of discriminatory motive is often unavailable. However, EPA will consider both direct and circumstantial evidence of discriminatory intent.

EPA's regulation also prohibits disparate impact (or discriminatory effect) discrimination.⁵⁸ The regulation, at 40 C.F.R. § 7.35(b), states in relevant part, that "[a] recipient shall not use criteria or methods of administering its program or activity which have the effect of subjecting individuals to discrimination because of their race, color, or national origin."

In a disparate impact analysis, EPA must determine whether the recipient used a facially neutral policy or practice that had a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin. This is referred to as the *prima facie* case. To establish an adverse disparate impact, EPA must:

- (1) identify the specific policy or practice at issue;
- (2) establish adversity/harm;⁵⁹

⁵³ 40 C.F.R. § 7.35(a); *see, also, Alexander v. Choate*, 469 U.S. 287, 292-293 (1985); *Guardians Ass'n. v. Civil Serv. Comm'n.* 463 U.S. 582, 593 (1983).

⁵⁴ *Elston v. Talladega Cty. Bd. of Educ.*, 997 F.2d 1394, 1406 (11th Cir. 1993).

⁵⁵ *Williams v. City of Dothan*, 745 F.2d 1406, 1414 (11th Cir. 1984).

⁵⁶ *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011).

⁵⁷ *See Washington v. Davis*, 426 U.S. 229, 242 (1976).

⁵⁸ 40 C.F.R. § 7.35(b); *see, also, Guardians*, 463 U.S. at 593 (concluding that Title VI reaches unintentional, disparate impact as well as intentional discrimination); *Alexander v. Choate*, 469 U.S. at 293 (confirming that, under *Guardians*, agencies enforcing Title VI can address disparate impact discrimination through their regulations). Many subsequent cases have cited *Guardians* in recognizing the validity of Title VI disparate impact claims. *See, e.g. Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *City of Chicago v. Lindley*, 66 F.3d 819, 827-28 (7th Cir. 1995) (internal citations omitted); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (internal citations omitted); *Larry P. v. Riles*, 793 F.2d 969, 981-982 (9th Cir. 1984); *see also* U.S. EPA's External Civil Rights Compliance Office Toolkit, p. 8 (Jan. 18, 2017).

https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf.

⁵⁹ Adversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm. U.S. EPA's External Civil Rights Compliance Office Toolkit, at 18, fn. 41.

- (3) establish disparity;⁶⁰ and
- (4) establish causation.⁶¹

The focus here is on the consequences of the recipient's policies or decisions, rather than the recipient's intent.⁶² The neutral policy or decision at issue need not be limited to one that a recipient formalizes in writing, but also could be one that is understood as "standard operating procedure" by recipient's employees. Similarly, the neutral practice need not be affirmatively undertaken, but in some instances could be the failure to take action, or to adopt an important policy.⁶³

If the evidence establishes a prima facie case of adverse disparate impact, as discussed above, EPA must then determine whether the recipient has articulated a "substantial legitimate justification" for the challenged policy or practice.⁶⁴ "Substantial legitimate justification" in a disparate impact case is similar to the Title VII employment concept of "business necessity," which in that context requires a showing that the policy or practice in question is demonstrably related to a significant, legitimate employment goal.⁶⁵ The analysis requires balancing recipient's interests in implementing their policies with the substantial public interest in preventing discrimination.⁶⁶

If a recipient shows a substantial legitimate justification for its policy or decision, EPA must also determine whether there are any comparably effective alternative practices that would result in less adverse impact. Thus, even if a recipient demonstrates a substantial legitimate justification, the challenged policy or decision will nevertheless violate federal civil rights laws if the evidence shows that less discriminatory alternatives exist.⁶⁷

⁶⁰ In analyzing disparity, EPA analyzes whether a disproportionate share of the adversity/harm is borne by individuals based on their race, color, national origin, age, disability or sex. A general measure of disparity compares the proportion of persons in the protected class who are adversely affected by the challenged policy or decision and the proportion of persons not in the protected class who are adversely affected. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576-77 (2d Cir. 2003) (internal citations omitted).

⁶¹ *See N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities").

⁶² *Lau v. Nichols*, 414 U.S. 563, 568 (1974).

⁶³ *See, e.g., Maricopa Cty.*, 915 F. Supp. 2d 1073, 1079 (D. Ariz. 2012) (disparate impact violation based on national origin properly alleged where recipient "failed to develop and implement policies and practices to ensure [limited English proficient] Latino inmates have equal access to jail services" and discriminatory conduct of detention officers was facilitated by "broad, unfettered discretion and lack of training and oversight" resulting in denial of access to important services).

⁶⁴ *Georgia State Conf.*, 775 F.2d at 1417. *See also, Patterson v. McLean Credit Union*, 491 U.S. 164, 186-87 (noting the framework for proof developed in civil rights cases), *citing, Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

⁶⁵ *Wards Cove Packing Inc. v. Antonio*, 490 U.S. 642, 659-660 (1989); *Griggs v. Duke Power Co.*, 401 U.S. 424, 432 (1971). The concept of "business necessity" does not transfer exactly to the Title VI context because "business necessity" does not cover the full scope of recipient practices that Title VI covers, which applies far more broadly to many types of public and non-profit entities. *See Texas Dept. of Hous. and Cmty. Affairs v. Inclusive Communities Project*, 135 S. Ct. 2507, 2522-24 (2015) (recognizing the limitations on extension of the business necessity concept to Fair Housing Act complaints).

⁶⁶ *See, Department of Justice Title VI Legal Manual, Section VII: Proving Discrimination – Disparate Impact, §C.2, <https://www.justice.gov/crt/fcs/T6Manual7#U>.*

⁶⁷ *Elston v. Talladega Cty. Bd. Of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993). *See U.S. EPA's External Civil Rights Compliance Office Toolkit*, p. 9-10.

Factual and Regulatory Background

Naturally Occurring Asbestos (NOA) and Health Effects

The term asbestos can be used for several types of naturally occurring fibrous minerals. NOA is present in many parts of California. When rock containing NOA is broken or crushed, asbestos fibers may be released and become airborne.⁶⁸ NOA emissions pose a significant risk to human health.⁶⁹ Exposure to NOA increases the risk of a person developing health issues that include, lung disease, lung cancer, mesothelioma, and asbestosis.⁷⁰

The California Air Resources Board and the Airborne Toxic Control Measures

The California Air Resources Board (“CARB”) identified asbestos as a toxic air contaminant (“TAC”) in 1986 and the EPA has previously identified asbestos as a hazardous air pollutant in 1971.⁷¹ Subsequently, CARB adopted two Airborne Toxic Control Measures to potentially address some health concerns related to the exposure of asbestos and minimize the release of asbestos fibers when conducting activities that involve the handling of NOA.⁷² One of the regulations relevant to the subject complaint is the California Code of Regulations Title 17 Section 93105, Airborne Toxic Control Measures for Construction, Grading, Quarrying, and Surface Mining Operations (“ATCM”), which was adopted in 2001.⁷³ This regulation addresses minimizing the placement of asbestos-containing materials on unpaved surfaces and establish work practices aimed at minimizing asbestos emissions from activities where naturally-occurring asbestos (“NOA”) is found or likely to be found.⁷⁴

The Parcel A Asbestos Dust Mitigation and Fugitive Dust Control Plan (ADMP)

Pursuant to the ATCM, development corporations conducting any ground disturbing activities on sites that may contain NOA soil and serpentine rock, are required to submit an Asbestos Dust Mitigation Plan to the corresponding air district for approval prior to any grading activities.⁷⁵ An ADMP must specify dust mitigation practices which are sufficient to ensure that no equipment or operation emits dust that is visible crossing the property line.⁷⁶ Accordingly, Lennar submitted its Asbestos Dust Mitigation Plan⁷⁷ (“ADMP”) for BAAQMD approval in September 2014, and

⁶⁸ California Air Resource Board, available at: <https://ww2.arb.ca.gov/our-work/programs/naturally-occurring-asbestos/about> [hereinafter CARB].

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ CARB and see also <https://www.epa.gov/asbestos/overview-asbestos-national-emission-standards-hazardous-air-pollutants-neshap#:~:text=Asbestos%20was%20one%20of%20the,CFR%20Part%2061%2C%20Subpart%20M>.

⁷² CARB.

⁷³ ATCM, 17 CCR Section 93105, subdivision (i)(12), defines Construction, Grading, Quarrying, and Surface Mining Operations as: “any surface disturbance conducted with powered equipment or any related activity, including, but not limit to, all surface and subsurface cuts and filles, excavation, trenching, stockpiling, bulldozing, and landfills” [hereinafter ATCM].

⁷⁴ *Id.*

⁷⁵ ATCM, Section 93105 (e)(3).

⁷⁶ *Id.*

⁷⁷ The “fugitive dust” portion of the ADMP is approved by the San Francisco Department of Public Health.

was subsequently approved by BAAQMD on May 20, 2015.⁷⁸ The ADMP states that it “identifies the Best Management Practices (BMPs)” and is drafted and implemented to reduce air particulate emissions resulting from soil disturbance or excavation associated with grading, utility work, construction of site infrastructure, and foundation construction.⁷⁹ This plan and its mitigation measures aims for a goal of “no visible dust” emissions from Parcel A and outlines the BMPs required to meet that goal.⁸⁰ Lennar is responsible for implementation and mitigation of potential dust resulting from soil disturbances on Parcel A.

Air Monitoring

Under the ATCM, air monitoring for asbestos is only required if the district Air Pollution Control Officer (“APCO”) uses their discretion to require it in an ADMP.⁸¹ If the APCO requires air monitoring, the air monitoring components of the ADMP must specify the: 1) type of air sampling devices, 2) the siting of the air sampling devices, 3) the sampling duration and frequency, and (4) the analytical method.⁸² Here, the APCO is BAAQMD’s Executive Director, Jack P. Broadbent. Mr. Broadbent used his discretionary authority as APCO to require air monitoring components be included in the Lennar Corporation’s ADMP. The Air Monitoring section of the ADMP describes the air monitoring protocol to be used at Parcel A.⁸³ The air monitoring is broken into two components, 1) Airborne asbestos dust monitoring in accordance with the ATCM; and 2) Fugitive dust (particulate) monitoring in accordance with San Francisco Health Code Article 31.⁸⁴ BAAQMD has regulatory authority for compliance of the former, and San Francisco Department of Public Health implements the latter. Both types of monitoring are required at the start of the project. Here, the airborne asbestos monitoring site is identified as NOA-0023.⁸⁵ As part of the ADMP, five (5) stationary air sampling locations were installed at the NOA-0023 Site.⁸⁶ The ADMP also requires a periodic independent third-party inspection of the NOA-0023 Site and Parcel A during construction.⁸⁷ As of February 18, 2020, Albion Partners is the independent third-party inspector responsible for monitoring at the NOA-0023 site at Parcel A.⁸⁸ The ATCM allows for decrease or possible cessation of airborne asbestos monitoring only after consultation with and approval by BAAQMD. Airborne asbestos dust monitoring may also cease when the project ceases disturbing soil, but only with notification and approval of BAAQMD.⁸⁹

Airborne asbestos monitoring is not required when the construction site on Parcel A is shut down and no work is being conducted, including no vehicles driven on unpaved surfaces. Generally,

⁷⁸ ADMP (Appendix A).

⁷⁹ ADMP, p. 2.

⁸⁰ ADMP, Section 2.3, p. 11, states: “The dust control measures set forth in this plan are intended to achieve a goal of no visible dust emissions associated with soil disturbance, movement, or excavation of soil, to the extent required [by applicable regulations].”

⁸¹ ATCM, Section 93105 (H)

⁸² *Id.*

⁸³ ADMP, Section 8, Air Monitoring, p. 27.

⁸⁴ *Id.*

⁸⁵ *Id.*

⁸⁶ ADMP, and *see also* Complaint p. 125.

⁸⁷ ADMP, Section 8.3, p. 30.

⁸⁸ Complaint Page 120

⁸⁹ ADMP, p. 21.

the construction site is shut down on weekends and holidays, therefore no monitoring is required, unless Lennar notifies BAAQMD otherwise.⁹⁰

The plan also includes information for the surrounding community to assist in monitoring and reporting conditions that are not in compliance with the ADMP.⁹¹ The ADMP requires a publicly visible sign with the telephone number to contact regarding dust, noise, or odor complaints to be posted prior to starting construction and maintained during construction.⁹² The phone line connects the caller to the contractor directly. For general complaints, the contractor will respond and take corrective action within 24 hours. During hours of active construction, phone calls will be answered or returned as soon as practicable. During non-work hours phone calls may be diverted to a message machine and returned the next business day.⁹³

NOA-0023 Site Air Monitor Results

As explained above, in his authority as APCO, Mr. Broadbent required air monitoring components to be included in the ADMP, as such, air monitoring results from the five monitors at the NOA-0023 Site must be sent to BAAQMD daily.⁹⁴ The federal Occupational Safety and Health Administration (OSHA) standards set an emission trigger level of 0.1 structures per cubic centimeter (S/cm³) for indoor air quality.⁹⁵ The subject ADMP sets a more stringent emissions trigger level of .016 structures per cubic centimeter (S/cm³). In its June 23, 2020 Inspection Report, Albion Partners, the designated Independent Third-Party inspection company pursuant to the ADMP, stated that air monitoring results collected “during the reporting period [of June 8, 2020 to June 21, 2020] and within the monitoring network, did not indicate levels of airborne asbestos equal to or greater than 0.016 structures per cubic centimeter (S/cm³) trigger level.”⁹⁶ The report also stated that “during the reporting period, BAAQMD had not indicated that the NOA-0023 Site needed different or additional dust control measures.”⁹⁷ With his Complaint, Complainant submitted four Inspection Reports, issued by Albion Partners on June 23, 2020, August 6, 2020, September 2, 2020, and September 16, 2020.⁹⁸ The air monitoring results include varied dates between June 8, 2020 and September 11, 2020.⁹⁹ On June 16, 2020, the alleged visible dust date, all five monitors read between .0009 and .0010.¹⁰⁰

BAAQMD Air Quality Complaint Response Protocol

Although the ADMP encourages the community surrounding Parcel A to assist in monitoring and reporting conditions on the property directly to the contractor, BAAQMD also participates in monitoring Parcel A in two ways. First, as part of the ADMP’s air monitoring components, BAAQMD receives daily distribution of air monitoring results from NOA-0023, conducts

⁹⁰ ADMP, Section 8, p 27.

⁹¹ ADMP, Section 8.4, p. 30.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ ADMP, Section 8.1.6., p. 32.

⁹⁵ 29 C.F.R. Part 1926.1101, Appendix A, OSHA Standards on Asbestos.

⁹⁶ Complaint, p. 125.

⁹⁷ *Id.*

⁹⁸ Complaint, Exhibits 12-16, p. 109-145.

⁹⁹ Complaint, Exhibits 12-16, p. 109-145.

¹⁰⁰ Compliant, Exhibit 12, p. 113.

routine inspections of Parcel A, and can indicate whether the NOA-0023 site requires additional or different dust control measures.¹⁰¹ Second, as the local air district, BAAQMD receives air complaints from the public. As part of that role, BAAQMD has an Air Quality Complaint Policy and Procedures protocol in place.¹⁰²

According to BAAQMD's procedures, an air quality complaint can be reported 24 hours a day, 7 days a week.¹⁰³ The complaints can be submitted through the toll-free complaint line¹⁰⁴ or via the online complaint form.¹⁰⁵ If a complaint is submitted during BAAQMD's core business hours of Monday through Friday, 7:30 a.m. to 6:00 p.m., complaints are received through the Air District's Dispatch Center and dispatched to Inspectors for investigation.¹⁰⁶ Each complaint is assigned a complaint reference number (C#), which is provided to the complainant and can be used to obtain the complaint investigation details and final report.¹⁰⁷ Complaints received on weekends, holidays, and outside of core business hours are processed through a third-party answering service.¹⁰⁸ During these times, the Air District has on-call staff available to respond to and investigate air pollution incidents that have "the potential for significant air emission impacts."¹⁰⁹

BAAQMD's procedures acknowledge the importance of responding promptly to air quality complaints "due to the unpredictable nature of complaints, duration of emissions, and potential public health and air quality impacts."¹¹⁰ The procedures account for "Complaint Response Time Goals" for various types of complaints.¹¹¹ For example, "Complaints with ongoing emissions" has a response time goal of 30 minutes, while "Complaints that do not have ongoing emissions" has a response time goal of 30 minutes to two (2) hours.¹¹² For asbestos complaints, inspectors are also encouraged to refer to specific asbestos policies and procedures.¹¹³

¹⁰¹ ADMP, Section 8, p. 27; *see also* Complaint, Exhibit 12, p. 109.

¹⁰² BAAQMD Air Quality Policy and Procedures, stating: "This Air Quality Complaint Policy and Procedures document provides a comprehensive overview of the program and is intended to guide Air District Inspectors (Inspectors) when responding to and investigating potential and ongoing releases of air emissions", available at: <https://www.baaqmd.gov/~media/files/compliance-and-enforcement/policies-and-procedures/air-quality-complaint-policy-and-procedures-pdf.pdf?la=es-mx> [hereinafter BAAQMD AQ Policy]

¹⁰³ *Id.*

¹⁰⁴ BAAQMD AQ Policy, BAAQMD's toll free complaint line is available at 1-800-334-ODOR.

¹⁰⁵ BAAQMD Air Quality Complaint, available at: www.baaqmd.gov/complaints.

¹⁰⁶ BAAQMD AQ Policy, p.5.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ BAAQMD AQ Policy, p.8, BAAQMD also acknowledges that some complaints may require a more enhanced approach stating, "responding quickly can help identify sources of air emissions and allow Inspectors to investigate and determine whether violations of air quality regulations have occurred. In situations where multiple complaints are received at the same time alleging similar emissions or site, additional staff resources may be needed for the investigations. The Inspector should notify his or her Supervisor to determine if additional Inspectors can assist to ensure timely complaint response and investigations. The Supervisor may evaluate whether an enhanced response is needed, which may include assignment of overtime shift work and/or additional staff coverage during and after business hours, weekends, and holidays."

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ *Id.*, note: in this case the asbestos policy would be ADMP; ADMP.

BAAQMD's procedures emphasize a timely complaint response and recommend that upon receiving complaints, inspectors contact the complainant to obtain additional information.¹¹⁴ The procedures encourage inspectors to contact complainants for additional relevant information and to determine whether the emissions are ongoing.¹¹⁵ If the complainant is unavailable or cannot be reached by phone, the Inspector should leave a voice message and proceed with the complaint investigation.

For each air quality complaint received, a comprehensive investigation will be conducted.¹¹⁶ The steps and order of an investigation are guided by the information provided by the complainant and determined by a variety of factors.¹¹⁷ A consideration of these factors may determine the order of an investigation, such as conducting an area patrol in the community, or proceeding directly to the alleged site and potential source of emissions.¹¹⁸ The procedures state that on-site investigations occur after a conversation with the complainant, however, if the inspector is familiar with the site and the potential emissions during the course of his/her work, the inspector can proceed directly to the alleged or suspected site to document emissions and potential violations in an attempt to quickly minimize off-site impact.¹¹⁹

According to BAAQMD procedures, following the inspector's complaint investigation, each complaint will be assigned a final complaint status of "confirmed" or "unconfirmed."¹²⁰ A "confirmed" complaint status is determined when the Inspector observes the emission in person and can trace the emission to a source. For certain emission sources (e.g., asbestos), the Inspector can identify the source of the emission through sample analysis and may evaluate supporting data such as data from monitoring devices.¹²¹ An "unconfirmed" complaint status is determined when an inspector is unable to verify the emission at the time of investigation.¹²²

After completion of an investigation, BAAQMD's procedures instruct inspectors to contact complainant (if available) and inform him/her of the investigation outcome.¹²³ The complainant should be informed of the complaint status (confirmed or unconfirmed) and the investigation findings and/or resolution of the complaint, if any. As part of the investigation, inspectors draft a complaint investigation report. Complainants may request a copy of the complaint investigation report.¹²⁴

BAAQMD's Response to Complainant's Air Quality Complaint

¹¹⁴ BAAQMD AQ Policy, p. 8.

¹¹⁵ *Id.*, the policy recommends meeting the complainant in person to observe the site, provided that the Complainant is available and accessible to the site.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ BAAQMD AQ Policy, p. 11.

¹²⁰ *Id.* at p. 13.

¹²¹ *Id.*

¹²² *Id.*

¹²³ BAAQMD AQ Policy, p. 15.

¹²⁴ BAAQMD AQ Policy, p. 15, Complainants can request a copy of a Complaint Report through the website, through the inspector, or through a public records request. Complainants may submit a Public Record Request by visiting www.baaqmd.gov/contact-us/request-public-records and providing the C#.

On June 24, 2020, Complainant spoke with BAAQMD's Supervising Air Quality Specialist, Mr. Kimball.¹²⁵ Mr. Kimball helped direct Complainant to the air pollution complaint link and informed him that he would contact BAAQMD's Senior Inspector Simon Winer to let him know a complaint would be filed.¹²⁶ On June 24, Mr. Kimball's last email to Complainant addressing questions about the air quality complaint process was sent at 5:27 PM. That evening, Complainant filed his air quality and Title VI complaint with BAAQMD.¹²⁷ Since the complaint was likely submitted after core business hours, Mr. Winer received the dispatch for the investigation on June 25, 2020. The dispatch included the air quality complaint itself, as well as the supplemental information Mr. Kimball conveyed to Mr. Winer regarding his conversation with the Complainant.¹²⁸ The air quality complaint was assigned the complaint number #243586. Mr. Winer proceeded directly to Parcel A after receiving the dispatch on June 25, 2020 morning to investigate the Complainant's air quality concerns due to alleged soil disturbances.¹²⁹ Mr. Winer was unable to confirm dust disturbances from construction because there was no work being conducted on the Parcel A on that day.¹³⁰ Mr. Winer called the Complainant after the visit to convey the findings of his inspection. Mr. Winer followed up with Complainant on June 26, 2020 via email to answer outstanding questions regarding Parcel A. On June 30, 2020, Mr. Winer drafted a Complaint Report, in which the complaint #243586 was assigned a final complaint status of "unconfirmed"¹³¹ Although the final complaint status was "unconfirmed," in the Report Mr. Winer wrote that he would follow up with Lennar to discuss Parcel A on July 1, 2020. After the completion of the formal complaint #243586 investigation, Complainant contacted Mr. Winer directly on September 14, 2020 to request he visit Parcel A again to ensure compliance with the "mitigation and monitoring program" and to check whether there were ongoing soil disturbance activities. The following day, Mr. Winer called Complainant and also followed up via email stating that he visits the site "a few times a week" and the adopted mitigation and monitoring program is being followed, stating "They [Lennar] have active water truck support if there is any use of the machinery [that could potentially cause dust]."¹³²

ECRCO's Investigation

In the subject Complaint, Complainant claimed that BAAQMD, under the regulatory authority granted by the ATCM did not comply with the ADMP, by failing to identify, mitigate, and monitor the possible risks of exposure of the surrounding community to NOA due to soil disturbances at Parcel A.¹³³ However, as stated above, Lennar, not BAAQMD is responsible for identifying and mitigating potential NOA emissions resulting from soil disturbances through the

¹²⁵ Complaint, Exhibit 2, p. 29; Complainant Interview, *supra* note 13.

¹²⁶ Complaint, Exhibit 2, p. 29, Mr. Kimball's last email to Complainant on June 24, 2020 was at 5:27 PM.

¹²⁷ Complaint, Exhibit 10, the Complaint is not timestamped, however, it may have been filed after BAAQMD staff core hours (6:00 PM), since the email from Mr. Kimball answering outstanding questions about the information to include in his complaint was sent at 5:27 PM.

¹²⁸ Complaint, Exhibit 2, p. 29, Mr. Kimball assigned the complaint to Mr. Winer and let him know the complaint was coming in.

¹²⁹ Complaint, BAAQMD Complaint Report, Exhibit 11, the complaint report states that Mr. Winer visited Parcel A at approximately 11:23 AM.

¹³⁰ Complaint, Exhibit 11.

¹³¹ *Id.*

¹³² Complaint, Exhibit 5, p. 6.

¹³³ Complaint, p. 6.

mitigation measures outlined in the ADMP.¹³⁴ Instead, BAAQMD is responsible for enforcing air quality requirements consistent with its nondiscrimination obligations through its review of air monitoring data and its response to any complaints about air quality. Therefore, ECRCO did not examine these claims, but rather investigated whether BAAQMD's response to the air quality complaint filed with BAAQMD by Complainant on June 24, 2020, resulted in a different treatment or disparate adverse impact against the predominantly Black population of Bayview Hunters Point Community.

Analysis- Disparate Treatment (Intentional Discrimination)

ECRCO investigated whether BAAQMD discriminated against the Black residents of Bayview Hunters Point on the basis of race, by failing to follow BAAQMD's Air Quality Complaint Policy and Procedures as required for all similarly situated complaints. That is, whether BAAQMD provided its investigation services for a complaint affecting the Bayview Hunters Point Community differently than it would other complaints not affecting a predominantly Black community. Evidence in a disparate treatment case must generally show that the recipient was not only aware of the complainant's protected status, but that the recipient acted, at least in part, because of the complainant's protected status.¹³⁵

Although BAAQMD procedures allow for air quality complaints to be reported 24 hours a day, 7 days a week, BAAQMD's core business hours are Monday through Friday, 7:30am to 6:00 PM. Complainant's air quality complaint was likely submitted close to or after core business hours on June 24, 2020, because Complainant's questions about the air quality complaint process were address by the supervisory inspector at 5:27pm.¹³⁶ Complaints filed online received afterhours are processed through a third-party answering service.¹³⁷ Such complaints are transferred to on-call staff only when the air pollution incidents have "potential for significant air emission impacts."¹³⁸ By the time Complainant filed his complaint that evening Mr. Winer was off duty.¹³⁹ Since Complainant's air quality concerns resulted from construction work on Parcel A during work hours, afterhours investigation would not have provided an inspector with the circumstances necessary to observe dust, as it was after Lennar's construction hours.

On June 25, 2020, Mr. Winer received the dispatch including the air quality complaint itself, now assigned the complaint reference number of #243586, as well as the supplemental information Mr. Kimball conveyed to Mr. Winer regarding his conversation with the Complainant, and finally the video footage Complainant provided Mr. Kimball allegedly recording visible dust at Parcel A on June 16, 2020.¹⁴⁰ BAAQMD procedures generally recommend that on-site investigations occur after a conversation with the complainant, however, if the inspector is familiar with the site and the potential emissions during the course of his/her work, the inspector can proceed directly to the alleged or suspected site.¹⁴¹ Here, Mr. Winer

¹³⁴ ADMP.

¹³⁵ *Doe ex rel. Doe v. Lower Merion Sch. Dist.*, 665 F.3d 524, 548 (3d Cir. 2011).

¹³⁶ BAAQMD AQ Policy, p. 5; *see also* Complaint, Exhibit 2, p.29.

¹³⁷ BAAQMD AQ Policy, p. 5.

¹³⁸ *Id.*

¹³⁹ Complaint, Exhibit 5, p.39; *see also* BAAQMD AQ Policy, p. 8.

¹⁴⁰ Complaint, Exhibit 2, p. 29, Mr. Kimball assigned the complaint to Mr. Winer and let him know the complaint was coming in.

¹⁴¹ BAAQMD AQ Policy, p. 11.

proceeded directly to the property to conduct his investigation prior to contacting the complainant.¹⁴² Mr. Winer's decision was consistent with the procedures because BAAQMD is not only familiar with the site, it monitors an ADMP designed to mitigate the specific potential NOA emissions reported in the complaint.¹⁴³

The procedures also emphasize a timely response to air quality complaints. Here, the recommended response time for a general reported emission that already occurred on June 16, 2020 would be 30 minutes to two (2) hours.¹⁴⁴ However, since this is an asbestos complaint, Mr. Winer would look to the specific procedures related to the activities occurring on Parcel A. Here, because of their air monitoring role pursuant to the ADMP, BAAQMD was aware that potential NOA emissions could only occur during Lennar's construction work hours at Parcel A.¹⁴⁵ Therefore, Mr. Winer's investigation at Parcel A at 11:23AM was appropriate to investigate potential visible dust during Lennar's construction work hours, provided Lennar was conducting work that day.

On June 25, during Mr. Winer's visit to Parcel A, Lennar was not conducting construction work. As a result, Mr. Winer was unable to verify the emission at the time of the investigation, and per BAAQMD protocol designated a final complaint status of "unconfirmed."¹⁴⁶ According to BAAQMD's procedures, inspectors can evaluate supporting data from air monitors to determine their final complaint status.¹⁴⁷ Here, in accordance with the ADMP, independent third-party inspectors, Albion Partners, submitted an Inspection Report (AB Report) to BAAQMD on June 23, 2020. There is no notation in his complaint report that Mr. Winer evaluated the AB Report, however, that report states that on June 16, 2020, the alleged visible dust date, all five monitors read between .0009 and .0010.¹⁴⁸ This is below the airborne asbestos trigger level of 0.016 structures per cubic centimeter (S/cm3).¹⁴⁹ As a result, Mr. Winer's final complaint status is consistent with BAAQMD procedures.

After completion of an investigation, BAAQMD procedures instruct inspectors to contact complainants, to inform them of the investigation final complaint status and any relevant findings or resolutions. Finally, BAAQMD procedures instruct inspectors to draft a complaint investigation report. Here, as per protocol, Mr. Winer called the Complainant after the visit to convey the findings of his inspection. Mr. Winer continued to communicate with Complainant to field follow up questions through June 26, 2020. On June 30, 2020, Mr. Winer drafted a Complaint Report and assigned complaint #243586 a final complaint status of "unconfirmed"¹⁵⁰ Although the final complaint status was "unconfirmed," Mr. Winer wrote that he would follow up with Lennar to discuss Parcel A on July 1, 2020 and proceeded to visit the

¹⁴² Complaint, Exhibit 5, p. 38, *see also* ADMP; BAAQMD AQ Policy.

¹⁴³ BAAQMD AQ Policy, p. 8.

¹⁴⁴ BAAQMD, AQ Policy, p. 8, stating "Complaints that do not have ongoing emissions" has a response time goal of 30 minutes to two (2) hours.

¹⁴⁵ Complaint, Exhibit 12, p.109.

¹⁴⁶ BAAQMD AQ Policy, p. 13.

¹⁴⁷ *Id.*

¹⁴⁸ Complaint, Exhibit 12, p. 113.

¹⁴⁹ Note, although the agreed upon ADMP trigger level is 0.016 structures per cubic centimeter (S/cm3), even this level does not indicate a violation, *see* 29 C.F.R. Part 1926.1101, Appendix A, OSHA Standards on Asbestos.

¹⁵⁰ Complaint, Exhibit 11.

property a few times a week after the resolution of complaint #243586.¹⁵¹ In fact, when the Complainant informally contacted Mr. Winer in September 2020 to request he visit Parcel A again to ensure compliance, Mr. Winer left Complainant a voicemail, then followed up via email stating he visits Parcel A throughout the week. Mr. Winer confirmed to the Complainant that the adopted mitigation measures were being followed, stating there was “active water truck support [to mitigate any machinery that could potentially cause dust].”¹⁵²

In investigating intentional discrimination under Title VI, ECRCO must determine whether BAAQMD intentionally treated the Complaint involving potential NOA exposure to the Black residents of the Bayview Hunters Point Community differently or otherwise knowingly caused them harm because of their race, color, or national origin. ECRCO has insufficient evidence, both direct and circumstantial of discriminatory treatment intent. Here, BAAQMD followed its procedures in the dispatch of the complaint, the investigation of the complaint, communicating with the Complainant, and reporting of the final complaint status. Mr. Winer’s investigation process was not conducted any differently than what was required of him for an asbestos air quality complaint per BAAQMD’s investigation procedures. Instead, Mr. Winer went beyond the requirements of BAAQMD’s policy in investigating the complaint by meeting with Lennar on July 1, 2020, after the final complaint status was already assigned and resolved. Furthermore, Mr. Winer continued to visit the property well after the complaint was resolved, evidenced by his discussion with Complainant in mid-September detailing his visits to Parcel A “a few times a week” to ensure the mitigation measures were continuing to take place.¹⁵³ BAAQMD’s continued efforts to monitor Parcel A outside of its role under the ADMP exceeds what is required under its complaint investigation protocol.

Analysis- Disparate Impact (Discriminatory Effect)

EPA’s regulation also prohibits disparate impact (or discriminatory effect) discrimination.¹⁵⁴ As stated earlier, in a disparate impact analysis, EPA must determine whether the recipient used a facially neutral policy or practice that had a sufficiently adverse (harmful) and disproportionate effect based on race, color, or national origin. This is referred to as the *prima facie* case. To establish an adverse disparate impact, EPA must:

- (1) identify the specific policy or practice at issue;
- (2) establish adversity/harm;¹⁵⁵

¹⁵¹ Complaint, Exhibit 5, p.36.

¹⁵² *Id.*

¹⁵³ BAAQMD AQ Policy, *see also* Complaint.

¹⁵⁴ 40 C.F.R. §7.35(b); *see, also, Guardians*, 463 U.S. at 593 (concluding that Title VI reaches unintentional, disparate impact as well as intentional discrimination); *Alexander v. Choate*, 469 U.S. at 293 (confirming that, under *Guardians*, agencies enforcing Title VI can address disparate impact discrimination through their regulations). Many subsequent cases have cited *Guardians* in recognizing the validity of Title VI disparate impact claims. *See, e.g. Villanueva v. Carere*, 85 F.3d 481, 486 (10th Cir. 1996); *New York Urban League v. New York*, 71 F.3d 1031, 1036 (2d Cir. 1995); *City of Chicago v. Lindley*, 66 F.3d 819, 827-28 (7th Cir. 1995) (internal citations omitted); *David K. v. Lane*, 839 F.2d 1265, 1274 (7th Cir. 1988); *Georgia State Conference of Branches of NAACP v. Georgia*, 775 F.2d 1403, 1417 (11th Cir. 1985) (internal citations omitted); *Larry P. v. Riles*, 793 F.2d 969, 981-982 (9th Cir. 1984); *see also* U.S. EPA’s External Civil Rights Compliance Office Toolkit, p. 8 (Jan. 18, 2017).

https://www.epa.gov/sites/production/files/2017-01/documents/toolkit-chapter1-transmittal_letter-faqs.pdf

¹⁵⁵ Adversity exists if a fact specific inquiry determines that the nature, size, or likelihood of the impact is sufficient to make it an actionable harm. U.S. EPA’s External Civil Rights Compliance Office Toolkit, at 18, fn. 41.

- (3) establish disparity;¹⁵⁶ and
- (4) establish causation.¹⁵⁷

Under this analysis, EPA must establish a *prima facie* case by determining whether the BAAQMD's Air Quality Policy and Procedures protocol and BAAQMD staff's implementation of that protocol, which is the specific policy at issue, subjected the Black residents of the Bayview Hunters Point Community to adverse and disproportionate harm based on race. This specific policy is the first prong of the *prima facie* case. ECRCO's review of the assignment of the complaint, investigation of the complaint, communication with complainant, and reporting of final complaint status determined that all actions were administered according to BAAQMD protocol.¹⁵⁸ To meet the second prong of the *prima facie* test, ECRCO analyzed whether the Black residents of the Bayview Hunters Point Community were subjected to adverse and disproportionate harm, even if BAAQMD followed their environmental complaint investigation procedures.

ECRCO did not find sufficient evidence to meet the second prong, that is, there was insufficient evidence of adverse harm being born disproportionately by the Bayview Hunters Point Community as a result of BAAQMD's administration of its air quality complaint investigation policy and procedures. Complainant's air quality complaint was assigned the final complaint status of "unconfirmed" because Mr. Winter was unable to confirm dust disturbances from construction since there was no work being conducted on the Parcel A on the day of his investigation.¹⁵⁹ However, as evidenced by the Complaint, Albion Partners' Inspection Reports, the NOA-0023 Site Monitoring Results Lennar worked on Parcel A before and since June 25, 2020.¹⁶⁰ That being said, there are several protocols in place to ensure that any work being conducted on Parcel A by Lennar, ensures that potential NOA is mitigated as required by federal and state standards. Those include the ADMP itself, BAAQMD's role in monitoring pursuant to the ADMP, and BAAQMD's routine inspections.

The ADMP is a protocol to ensure that local and industry standard mitigation measures are being employed by Lennar at Parcel A.¹⁶¹ Those protocols include BMPs, required independent third-party inspections, and air monitoring oversight by BAAQMD, SFDPH, and the community. Pursuant to the ADMP, Lennar is required to submit air monitoring results from NOA-0023 to BAAQMD on a daily basis.¹⁶² This means that if there is a monitor reading that was above the trigger level of 0.016 structures per cubic centimeter (S/cm³), BAAQMD would be privy to that

¹⁵⁶ In analyzing disparity, EPA analyzes whether a disproportionate share of the adversity/harm is borne by individuals based on their race, color, national origin, age, disability or sex. A general measure of disparity compares the proportion of persons in the protected class who are adversely affected by the challenged policy or decision and the proportion of persons not in the protected class who are adversely affected. *See Tsombanidis v. W. Haven Fire Dep't*, 352 F.3d 565, 576-77 (2d Cir. 2003) (internal citations omitted).

¹⁵⁷ *See N.Y.C. Envtl. Justice All. v. Giuliani*, 214 F.3d 65, 69 (2d Cir. 2000) (plaintiffs must "allege a causal connection between a facially neutral policy and a disproportionate and adverse impact on minorities").

¹⁵⁸ BAAQMD AQ Policy, *see also* Complaint.

¹⁵⁹ Complaint, Exhibit 11.

¹⁶⁰ Complaint.

¹⁶¹ ADMP.

¹⁶² ADMP, Section 8.1.6, p. 32, states, "All results from monitoring stations will be distributed to all project stakeholders via email on a daily basis regardless of the magnitude of the detected concentrations. The email distributions for air monitoring results will include BAAQMD staff, HPS DevCo development staff, general contractors working on behalf of HPS DevCo, and SFDPH staff."

information because of its designated role monitoring the ADMP. As noted above, Albion Partners' inspection report states that on June 16, 2020, the alleged visible dust date, all five monitors read below the trigger level. Pursuant to the ADMP, any monitoring results indicating data above the trigger level would require Lennar to shut down construction immediately.¹⁶³ Within its monitoring role under the ADMP, BAAQMD also conducts routine inspections of Parcel A and may also direct based on monitoring readings whether the NOA-0023 site needs different or additional dust control measures.¹⁶⁴

ECRCO did not find sufficient evidence to meet the second prong, that is, that there was sufficient evidence of adverse harm being born disproportionately by the Bayview Hunters Point Community as a result of BAAQMD's administration of its air quality complaint investigation policy and procedures. As such, a prima facie case of disparate impact discrimination could be established and ECRCO did not examine disparity or causation.

II. Preliminary Findings for Issue Number Two

Whether BAAQMD has and is implementing the procedural safeguards required under 40 C.F.R. Parts 5 and 7 that all recipients of federal assistance must have in place to comply with their general nondiscrimination obligations, including specific policies and procedures to ensure meaningful access to BAAQMD's services, programs, and activities, for individuals with limited English proficiency (LEP) and individuals with disabilities, and whether BAAQMD has a public participation policy and process that is consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.

ECRCO has determined that the preponderance of the evidence supports a conclusion that BAAQMD failed to comply with some of the obligations under the federal nondiscrimination laws and EPA's nondiscrimination regulation to have and implement a nondiscrimination program, including: procedural safeguards required under 40 C.F.R. Parts 5 and 7; and policies and procedures for ensuring meaningful access to BAAQMD's services, programs, and activities for individuals with LEP and individuals with disabilities.¹⁶⁵ Additionally, in 2016, ECRCO (then the Office of Civil Rights) addressed some of these requirements in a letter of findings and

¹⁶³ ADMP, p. 26.

¹⁶⁴ Complaint, p. 125.

¹⁶⁵ See Title VI, 42 U.S.C. 2000(d) *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a). See also U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 FR 35602 (June 25, 2004) (available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf); U.S. EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 FR 14207 (March 21, 2006) (available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_public_involvement_guidance_for_epa_recipients_2006.03.21.pdf); U.S. EPA, Procedural Safeguards Checklist for Recipients, at https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf (rev. Jan. 2020) (which provides a more detailed explanation of nondiscrimination obligations and best practices); U.S. EPA, Disability Nondiscrimination Plan Sample, at https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf. (2017).

provided technical assistance to BAAQMD about regulatory compliance requirements as well as best practices, so several of these deficiencies had been identified and were not addressed despite the technical assistance provided.¹⁶⁶

Prior Technical Assistance Provided to BAAQMD by ECRCO

In 2016, ECRCO had an opportunity to review BAAQMD's nondiscrimination program, particularly its requirements under 40 C.F.R. Part 7.¹⁶⁷ ECRCO examined, in part, BAAQMD's notice of nondiscrimination, grievance procedures, designation of a nondiscrimination coordinator, Language Access Plan ("LAP"), disability access policy, and public participation process.

At that time, BAAQMD had some of these requirements in place, including a public participation plan and a LAP. ECRCO provided additional technical assistance to assist BAAQMD in achieving other areas of compliance as well as to help BAAQMD develop best practices for these documents and develop other components of its nondiscrimination program.

In response to the technical assistance provided by ECRCO, BAAQMD updated several of its nondiscrimination program documents and practices to comply with EPA's nondiscrimination regulation. At the closure of that investigation, BAAQMD had designated a nondiscrimination coordinator with a position description that included tracking, updating, evaluating the complaint process, training BAAQMD staff about the nondiscrimination obligations, establishing an investigation manual, and grievance procedures emphasizing prompt and impartial investigations. In addition, BAAQMD had crafted an "Accessibility and Non-Discrimination Policy", BAAQMD committed to posting its nondiscrimination policy prominently in its office and annual reports, as well as on its website.

Furthermore, BAAQMD committed to translating vital documents in accordance with their existing LAP, including the nondiscrimination documents in prominent LEP languages and agreed to make the documents available online and in paper formats. BAAQMD's public participation policy failed to provide guidance on how persons with disabilities would participate in BAAQMD public involvement activities and although BAAQMD included that information in its "Accessibility and Nondiscrimination Policy," ECRCO recommended it include that information also in its Public Participation Policy.¹⁶⁸

Notice of Nondiscrimination

EPA's nondiscrimination regulation requires BAAQMD have a notice of non-discrimination (Notice) stating that the recipient does not discriminate on the basis of race, color, national origin, age, sex or disability in its programs or activity receiving EPA assistance or, in programs covered by Section 13 of the Education Amendments, on the basis of sex.¹⁶⁹ The Notice must be

¹⁶⁶ EPA Complaint No. 02R-00-R9 Resolution Letter, June 6, 2016, available at

https://www.epa.gov/sites/production/files/2016-06/documents/2r-00-r9_baaqmd_resolution_letter.pdf.

¹⁶⁷ This review was part of ECRCO's investigation of BAAQMD pursuant to EPA Complaint No. 02R-00-R9, available at https://www.epa.gov/sites/production/files/2016-06/documents/2r-00-r9_baaqmd_resolution_letter.pdf.

¹⁶⁸ EPA Complaint No. 02R-00-R9 Resolution Letter.

¹⁶⁹ 40 C.F.R. § 7.95(a); 40 C.F.R § 5.140.

posted in a prominent place including in the recipient's offices or facilities, on the recipient's website homepage, and in general publications distributed to the public. The Notice must be meaningfully accessible to individuals with limited English Proficiency (LEP) and individuals with disabilities.¹⁷⁰ The Notice must also clearly identify the nondiscrimination coordinator, including name and contact information.¹⁷¹

Preliminary Findings

ECRCO has determined that BAAQMD has a Notice of Nondiscrimination ("Notice")¹⁷², however, ECRCO has identified the following deficiencies:

- BAAQMD's Notice is not prominently displayed on its website homepage and not readily accessible to the public. To access the Notice or any information about "nondiscrimination" online, a person would have to know what they are looking for and proactively use the search bar to attempt to find the notice or any mention of discrimination. As such, this does not meet the regulatory requirement that Notice be posted prominently.¹⁷³
- BAAQMD's Notice does not include a statement addressing retaliation discrimination, that is, that BAAQMD does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights.¹⁷⁴
- Although BAAQMD's Notice does identify a former Nondiscrimination Coordinator, the information is outdated. Currently, John Chiladakis is the Acting Nondiscrimination Coordinator, but his information, including name and contact information enabling a member of the public to contact him, is not provided.
- EPA's nondiscrimination regulation requires "Where appropriate, such notice [of nondiscrimination] must be in a language or languages other than English." However, as previously stated, there is no prominently posted Notice, in any language. At this time, to access BAAQMD's Notice in English, a person would need to know what they are looking for and conduct a search in English. For a person with limited English proficiency, this burden is intensified, for, even if the Notice were posted prominently on BAAQMD's website homepage, currently, there is no prompt in any language other than English to access materials in any other language. The word "languages" and "English" appear at the top of the homepage and the phrase "language translation" appears at the very bottom of the page, in English. If a person knows to click on the word "English" at the top of the page, a "Google Translate" scroll down menu appears and one is able to select among Spanish, Chinese, Tagalog or Vietnamese (posted in those languages). A selection of a language will translate much, but not all of the homepage. Again, because

¹⁷⁰ 40 C.F.R. § 7.95(a); 40 C.F.R § 5.140.

¹⁷¹ 40 C.F.R. § 7.95(a); 40 C.F.R § 5.140.

¹⁷² BAAQMD Notice of Nondiscrimination and Accessibility, available at: <https://www.baaqmd.gov/about-the-air-district/diversity-equity-and-inclusion/accessibility>.

¹⁷³ This lack of public access of the Notice of Nondiscrimination online is particularly relevant during the time when BAAQMD offices have been inaccessible due to COVID-19 restrictions, thus, making any physically posted notices on premises, obsolete. In light of COVID-19 restrictions, the regulatory requirement as to "prominent" posting of this information, including online, is that much more important in providing access to the nondiscrimination notice.

¹⁷⁴ 40 C.F.R. § 7.100.

there is no information on the homepage about “discrimination”, in any language, even if the person with LEP figures out how to access Google Translate, they then have to conduct a search of BAAQMD’s website to find information about nondiscrimination. ECRCO finds that this is not consistent with the intent of the regulatory requirement that “Notice” be posted prominently and be available and accessible in the appropriate languages other than English.¹⁷⁵

- Finally, the EPA regulation requires that BAAQMD’s Notice be accessible to persons with disabilities. Methods of notice must accommodate those with impaired vision or hearing.¹⁷⁶ In its Notice of Nondiscrimination, BAAQMD states that it ensures the content of its website can “be reached by the widest possible audience regardless of disability, limitations of computer equipment or use of alternative Internet access devices” but does not provide more detail on how an individual with disabilities may receive an accommodation to access the notice.

Therefore, ECRCO has determined that BAAQMD is not in compliance with EPA’s nondiscrimination regulation with respect to its Notice of Nondiscrimination¹⁷⁷

Nondiscrimination Coordinator

EPA’s nondiscrimination regulation requires that EPA recipients, like BAAQMD, with fifteen or more employees must designate a nondiscrimination coordinator to oversee their nondiscrimination program.¹⁷⁸ In addition, under the “Notice of Nondiscrimination,” the regulation requires that the Notice “identify the responsible employee” designated as the recipient’s Nondiscrimination Coordinator.¹⁷⁹

Preliminary Findings

ECRCO has determined, BAAQMD has a designated Nondiscrimination Coordinator, however, ECRCO has identified the following deficiencies:

- As mentioned above, John Chiladakis has been serving as BAAQMD’s Acting Nondiscrimination Coordinator, since ECRCO accepted the subject Complaint in December 2020, however, the nondiscrimination coordinator information online still refers persons who have questions or concerns about discrimination to former nondiscrimination coordinator, Rex Sanders. A telephone number and email address is provided online for Mr. Sanders with no mention of Mr. Chiladakis. ECRCO could not find any mention of Mr. Chiladakis as the Acting Nondiscrimination Coordinator on any of BAAQMDs online materials. Further, the answering message for the telephone number provided for Mr. Sanders, states, in English only, that you have reached the BAAQMD offices and asks that you leave a message. It provides no mention of Mr.

¹⁷⁵ 40 C.F.R. § 7.95(a); 40 C.F.R § 5.140.

¹⁷⁶ 40 C.F.R. § 7.95(a); 40 C.F.R § 5.140.

¹⁷⁷ 40 C.F.R. § 7.95(a); 40 C.F.R § 5.140.

¹⁷⁸ 40 C.F.R. § 7.85(g) (if a recipient employs 15 or more employees, it shall designate at least one person to coordinate its efforts to comply with its obligations under this part); 40 C.F.R § 5.135(a) requiring the designation of a responsible employee with respect to Title IX of the Education Amendments of 1972, as amended.

¹⁷⁹ See 40 C.F.R. § 7.95; 40 C.F.R § 5.135(a) requiring the designation of a responsible employee with respect to Title IX of the Education Amendments of 1972, as amended.

Sanders or Mr. Chiladakis, a nondiscrimination coordinator, or anything about the nondiscrimination program. Mr. Sanders' email provides an automatic reply redirecting the sender to "please contact John Chiladakis, Acting CAO, at jchiladakis@baaqmd.gov," however, fails to mention that Mr. Chiladakis is serving as the Acting Nondiscrimination Coordinator.¹⁸⁰ As such, the only other way for the public to attempt to reach the Nondiscrimination Coordinator is to either write to a general address with no specific name of a person or to call the BAAQMD offices and ask for a nondiscrimination coordinator, if the person knows to ask for one. ECRCO has determined that BAAQMD is not meeting the regulatory requirement that BAAQMD identify a nondiscrimination coordinator, including how the public may access that person, with enough specificity including the name, to enable a member of the public to contact that Coordinator.¹⁸¹

- In addition, although Complainant's June 24, 2020 complaint with BAAQMD included environmental concerns, including with respect to air quality, the complaint also contained a clear complaint of discrimination: "[t]his is a complaint under Title VI of the Civil Rights Act for BAAQMD's failure to enforce compliance regarding the release of NOA."¹⁸² Although Complainant was contacted by a BAAQMD employee about the environmental issues, at no time was his civil rights complaint acknowledged, nor was the Complainant directed to the nondiscrimination complaint process, or to the nondiscrimination coordinator. (*See also* under Grievance Procedures.)
- BAAQMD confirmed that BAAQMD's Acting Non-Discrimination Coordinator was never notified about receipt of the Complainant's Title VI complaint.¹⁸³ As such, the Title VI complaint was not processed through BAAQMD's nondiscrimination grievance procedures as required by the regulation, and Complainant did not receive a determination from BAAQMD on his June 24, 2020 Title VI claim, also as required by EPA's nondiscrimination regulation. Further, it is clear that, although one of the duties of the Nondiscrimination Coordinator is to ensure that all employees who interact with the public are trained about the nondiscrimination policies and procedures (including familiarity with terms identifying discrimination claims, such as "Title VI" and "civil rights") required by the civil rights laws and EPA's nondiscrimination regulation, it appears Mr. Kimball and Mr. Winer, the BAAQMD employees who handled the Complainant's June 24, 2020 complaint with BAAQMD, had not received such training.
- On June 4, 2021, BAAQMD updated its "BAAQMD Air Quality Complaint Policy and Procedures" to include language acknowledging its commitment to the BAAQMD Accessibility and Nondiscrimination Policy, and BAAQMD staff who receive complaints claiming discrimination (denial of full and equal access to an BAAQMD program or activity based on a protected status),¹⁸⁴ "shall promptly notify their manager of the allegation and the manager shall refer the complaint to the Air District Non-

¹⁸⁰ Email from ECRCO to Rex Sanders, May 12, 2021.

¹⁸¹ 40 C.F.R. § 7.85(g), § 7.95; 40 C.F.R. § 5.135(a).

¹⁸² Title VI Complaint filed by Complainant with ECRCO, p. 101. (November 25, 2020).

¹⁸³ During ECRCO's March 10, 2021 conference call with BAAQMD, Mr. Chiladakis stated that although the Air Quality staff receive training on the nondiscrimination policies and procedures, the BAAQMD air quality staff was not familiar with the technical term "Title VI" used in Complainant's air quality complaint. As a result, the complaint was not identified as a discrimination complaint to be forwarded to the Nondiscrimination Coordinator.

¹⁸⁴ BAAQMD AQ Policy, p. 4, the policy describes discrimination and discrimination claims as a denial of full and equal access to an BAAQMD program or activity based on a protected status.

Discrimination Coordinator. BAAQMD's updated policy is a positive step, however, implementation of the new policy through proper training is imperative for BAAQMD to fully comply with the nondiscrimination laws, regulations, and best practices.

Therefore, ECRCO finds that BAAQMD is not in compliance with EPA's nondiscrimination regulation with respect to its Nondiscrimination Coordinator¹⁸⁵

Grievance Procedures

EPA's nondiscrimination regulation requires that each recipient with fifteen or more employees, like BAAQMD, adopt and publish grievance procedures that ensure the prompt and fair resolution of complaints.¹⁸⁶ Additionally, the U.S. Department of Justice's regulation on "Coordination of Enforcement of Non-discrimination in Federally Assisted Programs," requires recipients to display prominently information regarding the nondiscrimination requirements of Title VI, including the procedures for filing complaints.¹⁸⁷

Preliminary Findings

BAAQMD has adopted and published grievance procedures as "Nondiscrimination Policy and Complaint Procedures"¹⁸⁸, however, ECRCO reviewed the policy and procedures and determined that it does not assure the prompt and fair resolution of complaints. Specifically:

- BAAQMD's Nondiscrimination Policy and Complaint Procedures are not prominently displayed online and as such, not readily accessible to the public.¹⁸⁹ In order to find this policy and procedures, one must conduct a search of BAAQMD's website. We note that, to file an air pollution complaint, a complainant can find a link on BAAQMD's main homepage that takes them directly to the complaint page. The air pollution complaint form includes a live link where a complaint can be populated and immediately submitted

¹⁸⁵ See 40 C.F.R. § 7.85(g), § 7.95; 40 C.F.R § 5.135(a).

¹⁸⁶ 40 C.F.R. § 7.90 (each recipient with 15 or more employees shall adopt grievance procedures that assure the prompt and fair resolution of complaints). See also 40 C.F.R. §5.135(b) ("Complaint procedure of recipient. A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by these Title IX regulations.).

¹⁸⁷ 28 C.F.R. §42.405(c) ("Federal agencies shall require recipients, where feasible, to display prominently in reasonable numbers and places posters which state that the recipients operate programs subject to the nondiscrimination requirements of title VI, summarize those requirements, note the availability of title VI information form recipients and the federal agencies, and explain briefly the procedures for filing complaints. Federal agencies and recipients shall also include information on title VI requirements, complaint procedures and the rights of beneficiaries in handbooks, manuals, pamphlets and other material which are ordinarily distributed to the public to describe the federally assisted programs and the requirements for participation by recipients and beneficiaries. To the extent that recipients are required by law or regulation to publish or broadcast program information in the news media, federal agencies and recipients shall insure that such publications and broadcasts state that the program in question is an equal opportunity program or otherwise indicate that discrimination in the program is prohibited by federal law.").

¹⁸⁸ See at: <https://www.baaqmd.gov/contact-us/non-discrimination>

¹⁸⁹ This lack of public access online is particularly relevant during the time when BAAQMD offices have been inaccessible due to COVID-19 restrictions, thus, making any physically posted nondiscrimination policy and complaint procedure located on premises, obsolete. In light of COVID-19 restrictions, the regulatory requirement as to "prominent" posting/display of this information, including online, is that much more important in providing access to BAAQMD's nondiscrimination process.

online. However, the discrimination complaint process provides none of that access. The discrimination form must be downloaded, filled out and mailed. In fact, when this complaint was accepted for investigation, the link to BAAQMD's complaint form was broken. Once ECRCO brought this to BAAQMD's attention, the link was repaired. However, it is not known how long the link remained broken before ECRCO raised the issue with BAAQMD.

- BAAQMD's policy and procedures do not provide timeframes for completion of the investigation and an expected response time for the complainant. As such, it does not ensure "prompt" resolution of complaints.¹⁹⁰
- Neither the Nondiscrimination Policy nor the Complaint Procedures discuss or include retaliation/intimidation as one of the bases for filing a complaint under these procedures. In fact, BAAQMD's Discrimination Complaint Form does not list any bases for filing a complaint under its procedures, but rather requests complainants write in what "protected class(es) of persons" they belong to.¹⁹¹ This places an unreasonable burden on members of the public to figure out what type of complaint of discrimination is actionable and what "protected class" they would fall under. It is unreasonable to assume that the average member of the public would understand the technical definition of "protected class."
- As BAAQMD's Nondiscrimination Policy and Complaint Procedures are not prominently displayed online and as such, not readily accessible to the public it is also not accessible to persons with limited English proficiency. Even if the person with LEP is able to figure out how to access the Google Translate" function, the Complaint form itself is only accessible in English and, thus, BAAQMD is not providing meaningful access to persons with limited English proficiency to fair and prompt grievance procedures required by EPA's regulation.¹⁹²
- Finally, there is evidence that BAAQMD's nondiscrimination grievance process is not fair, prompt or available to the public. As previously discussed, the June 24, 2020 Title VI complaint filed by Complainant through BAAQMD's air pollution complaint process, the only process readily available through BAAQMD's main homepage, was never processed through BAAQMD's Nondiscrimination Policy and Complaint Procedures and Complainant never received a determination from BAAQMD on his Title VI claim.¹⁹³

Therefore, ECRCO has determined that BAAQMD is not in compliance with EPA's nondiscrimination regulation with respect to the adoption and publication of fair and prompt grievance procedures.

Meaningful Access for Persons with Limited English Proficiency (LEP)

Title VI and EPA's nondiscrimination regulation prohibit discrimination on the basis of national origin. The Supreme Court has interpreted this prohibition to include discrimination on the basis

¹⁹⁰ 40 C.F.R. § 7.90; 40 C.F.R. §5.135(b).

¹⁹¹ BAAQMD Discrimination Complaint Form, available at <https://www.baaqmd.gov/~media/files/administration/forms/title-vi-complaint-form-pdf.pdf?la=en>.

¹⁹² 40 C.F.R. § 7.90; 40 C.F.R. §5.135(b).

¹⁹³ 40 C.F.R. § 7.90; 40 C.F.R. §5.135(b).

of English proficiency, that is, a person's inability to speak, read, write, or understand English.¹⁹⁴ As a recipient of EPA financial assistance BAAQMD is required to provide meaningful access to its services, programs and activities for persons with limited English proficiency.¹⁹⁵ To ensure BAAQMD is providing meaningful access, BAAQMD should conduct appropriate analyses to determine what languages other than English are used by persons with LEP in BAAQMD's service area and to determine what language services or mix of language services it needs to provide to ensure that persons with LEP can meaningfully access and participate in its programs, activities and services. This includes, for example, development of a language access plan; translation of vital documents into prominent languages; and provision of simultaneous interpretation of public proceedings and meetings in prominent languages for persons with LEP so they may effectively participate.¹⁹⁶

It is important to note that as part of requesting and receiving EPA financial assistance, BAAQMD agreed based on Paragraph 39 of EPA's general terms and conditions¹⁹⁷, to more specific obligations, including that: "As a recipient of EPA financial assistance, you are required by Title VI of the Civil Rights Act to provide meaningful access to LEP individuals. In implementing that requirement, the recipient agrees to use as a guide the Office of Civil Rights (OCR) document entitled "Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons." The guidance can be found at: <https://www.federalregister.gov/documents/2004/06/25/04-14464/guidance-toenvironmental-protection-agency-financial-assistance-recipients-regarding-title-vi> ii."

Preliminary Findings

Based on a review of all available information, including a review of BAAQMD's website and available documents, although BAAQMD has some language access policies and procedures,¹⁹⁸ overall, ECRCO has determined that BAAQMD is not providing meaningful access for persons with limited English proficiency to BAAQMD's programs, activities and services.

¹⁹⁴ See Title VI, 42 U.S.C. 2000(d) *et seq.*; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a).

¹⁹⁵ See also U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf).

¹⁹⁶ See Title VI, 42 U.S.C. 2000(d) *et seq.*; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a). See also U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf).

¹⁹⁷ https://www.epa.gov/sites/production/files/2020-11/documents/fy_2021_epa_general_terms_and_conditions_effective_november_12_2020.pdf.

¹⁹⁸ BAAQMD Language Access Plan, available at <https://www.baaqmd.gov/~media/files/communications-and-outreach/community-outreach/community-language-assessment/lep-report-111510.pdf>; see also BAAQMD Public Participation Plan available at: <https://www.baaqmd.gov/plans-and-climate/public-participation-plan>.

With respect to information available to the public related to language services, if a person is able to search BAAQMD's website, (in English unless you are able to understand and activate the "Google Translate" function) they can find information about "effective communication." This webpage includes a link to language assistance information about how to access language services, however, the information is vague and limited and can only be accessed by persons with LEP if they search the website and know how to activate the Google Translate function.¹⁹⁹ A telephone number is provided where persons can call to request language assistance. That information, and same telephone number, is also stated in Spanish. There is then a reference to information for accessing language services in other languages and the same telephone number, but this is printed in English. Upon calling the number provided, it is for the Bay Area Communications Office. A pre-recorded message instructs the public as to what number to press to access different departments and information. However, all the information provided is in English only, without any option for accessing information in any other language.

Further, if one searches BAAQMD's website, one can also find a 2010 report titled "Assessment of Limited English Proficient Populations and Current Services - Bay Area Air Quality Management District"²⁰⁰ (This report is not accessible through BAAQMD's Nondiscrimination webpage.) While this report contains important information about the demographics and languages spoken by persons with LEP in the BAAQMD service area, this information is now 12 years old and was based on 2000 Census data, as well as surveys from 2006, 2008, and 2009, and requires reassessment and update. The report also contains information about the steps BAAQMD will take to ensure meaningful access to BAAQMD's programs, services and activities, including to ensure meaningful participation for persons with LEP, it is not clear these are still in effect, given the lack of more recent policies and procedures. Further, this document is available only in English.

Finally, as previously discussed, it does not appear BAAQMD is using the services of a qualified translator to translate its "vital documents" into the appropriate languages of persons with LEP within BAAQMD's service area. Instead, online public access to information in other languages appears to be limited to the activation of a "Google Translate" function, and this function does not even apply to all sources of important information on BAAQMD's website. BAAQMD's own 2010 report appropriately calls for the translation of vital documents into the appropriate languages. However, no vital documents translated through the services of qualified translators appear to be posted online, including the nondiscrimination documents in accordance with its own 2010 policy.

Even plans and reports that discuss BAAQMD's commitment to providing access and engagement with residents it serves are not accessible to persons with limited English proficiency. For example, BAAQMD has in place a Public Participation Plan that it first published in 2013. "The plan describes how the Air District informs and engages Bay Area residents in its activities."²⁰¹ Although this plan also includes data about BAAQMD's limited

¹⁹⁹ See at: <https://www.baaqmd.gov/language-translation>.

²⁰⁰ See at <https://www.baaqmd.gov/~media/files/communications-and-outreach/community-outreach/community-language-assessment/lep-report-111510.pdf>

²⁰¹ <https://www.baaqmd.gov/plans-and-climate/public-participation-plan>.

English proficient populations/languages it serves, it does not provide specific policies and procedures how it will provide those populations effective translation and interpretation services to ensure meaningful access. Also, this report is only available online in English. Similarly, in 2020, BAAQMD published a report called "Our Shared Journey Toward Meaningful Community Engagement: Where We've Been & How We're Navigating the Road Ahead Together."²⁰² This report provides a summary of the Air District's implementation of the 2013 Plan and although it addresses inclusion of communities with limited English proficiency and information about the inclusion of language minority communities, it also does not provide specific information about how it will ensure meaningful access through interpreter and translation services and, it is only available online in English.

Accordingly, ECRCO has determined that BAAQMD is not in compliance with its obligation under Title VI to ensure meaningful access to its services, programs or activities for persons with limited English proficiency.

Individuals with Disabilities

EPA's nondiscrimination regulation provides that no individual with a disability "shall solely on the basis of [disability] be excluded from participation in, be denied the benefits of, or otherwise be subjected to discrimination under any program or activity receiving EPA assistance."²⁰³ Recipients also must make sure that interested persons, including those with impaired vision or hearing, can find out about the existence and location of program services, activities, and facilities that are accessible to and usable by persons with disabilities and that recipients must give priority to methods of providing accessibility that offer program benefits to persons with disabilities in the most integrated setting appropriate.²⁰⁴ To ensure nondiscrimination for persons with disabilities, it is a recognized best practice for recipients to develop, publicize and implement written procedures to ensure meaningful access to its programs, services and activities for individuals with disabilities that clearly and consistently provide a recipient's "plan" for how it will provide, at no cost, appropriate auxiliary aids and services, including but not limited to, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals as necessary to ensure effective communication and an equal opportunity to participate fully in the benefits, activities, programs and services provided by the recipient, in a timely manner and in such a way as to protect the privacy and independence of the individual. To assist recipients with its nondiscrimination requirements, EPA has published a sample disability nondiscrimination plan, which provides technical assistance guidance with respect to the nondiscrimination coordinator's role, grievance procedures, facility accessibility, and accommodations.²⁰⁵ ECRCO has responsibility for enforcing Section 504 of the Rehabilitation Act of 1973, but does not have responsibility for enforcing compliance with the Americans with Disabilities Act (ADA). However, the Sample Plan addresses both statutes, in recognition that most recipients have obligations under both laws.

²⁰² https://www.baaqmd.gov/~media/files/planning-and-research/ppp/our_shared_journey_toward_meaningful_community_engagement-pdf.pdf?la=en.

²⁰³ 40 C.F.R. § 7.45.

²⁰⁴ 40 C.F.R. § 7.65 (b) and (d).

²⁰⁵ https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf

Preliminary Findings

BAAQMD's Disability Policy has been combined with its Notice of Nondiscrimination and is very limited in the information it provides. In its policy, BAAQMD does include information about auxiliary aids and services being available to individuals with disabilities to ensure effective communication and participation.²⁰⁶ It does not make clear, however, that these services will be provided at no cost to the requester, which may reasonably serve as a deterrent for an individual with disabilities from requesting accommodations. Furthermore, it does not make any explicit reference to ensuring that facilities and in-person meetings will be made or selected based on their accessibility to individuals with physical disabilities. It is important that such a reference be included here as BAAQMD does not make any reference to individuals with disabilities within their public participation plan.²⁰⁷ Neither BAAQMD's accessibility statement, nor its grievance procedures provides clear and consistent instructions for persons with disabilities on how to seek reasonable accommodations in order to meaningfully participate in BAAQMD's programs, services and activities and/or to file a grievance for discrimination on the basis of disability.²⁰⁸ Under these circumstances, ECRCO has determined that BAAQMD is not in compliance with Section 504 of the Rehabilitation Act of 1973, or EPA's nondiscrimination regulation.

Public Participation

BAAQMD must ensure that no person is excluded from participation in, denied the benefits of, or subjected to discrimination under any program or activity receiving EPA assistance on the basis of race, color, national origin, disability, age or on the basis of sex and age in any program or activity receiving EPA assistance.²⁰⁹ Indeed, EPA's guidance reminds recipients that public participation policies, processes and practices must be consistent with Title VI and the other federal civil rights laws, and EPA's implementing regulation at 40 C.F.R. Parts 5 and 7.²¹⁰ Further, in EPA's Title VI Public Involvement Guidance, EPA encourages recipients of EPA federal funding to fully engage with as many members of the affected [by a particular program] community as possible in the discussions and decisions made regarding issues in their community.²¹¹ Drafting a public participation plan helps recipients to consider differences in culture, levels of experience and knowledge, and financial resources in implementing and creating accessible programs and services.²¹² A public participation plan is a document that outlines early involvement tools to identify community concerns and lay out approaches recipients plan to take to address those concerns through its programmatic services and outreach activities. It also serves as a source to community members of their public involvement opportunities during recipient's decision-making processes.²¹³ An effective public participation

²⁰⁶ BAAQMD Nondiscrimination and Accessibility Notice at https://www.baaqmd.gov/about-the-air-district/diversity-equity-and-inclusion/accessibility?sc_lang=en&switch_lang=true.

²⁰⁷ 40 C.F.R. § 7.45; 40 C.F.R. § 7.65 (b) and (d).

²⁰⁸ 40 C.F.R. § 7.45; 40 C.F.R. § 7.65 (b) and (d).

²⁰⁹ 40 C.F.R. § 7.145; 40 C.F.R. § 7.30; 40 C.F.R. § 7.45; 40 C.F.R. § 7.65 (b) and (d).

²¹⁰ Environmental Protection Agency Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 FR 14207, available at <https://www.govinfo.gov/content/pkg/FR-2006-03-21/pdf/06-2691.pdf>.

²¹¹ 71 FR 14207, 14211.

²¹² 71 FR 14207, 14211.

²¹³ 71 FR 14207, 14211.

plan also creates a basis for efficient communication with the public, answers basic concerns about community involvement and helps ensure more collaborative, and as a result better decision topics that affect the community.²¹⁴ ECRCO encourages recipients to include communities in the development of public participation plans. Public participation plans are public documents that should always be available for public viewing. They should also be living documents that can be easily revised to address any needs and concerns that may arise in the community.

Preliminary Findings

Based on a review of publicly available information, including a review of BAAQMD's website and documents, BAAQMD does have in place a Public Participation Plan that includes many of the "best practices" encouraged by EPA's Title VI Public Involvement Guidance to ensure the broadest possible engagement with all communities within BAAQMD's service area.²¹⁵ However, because ECRCO has found that BAAQMD does not have in place the necessary policies and procedures to provide meaning access for persons with limited English proficiency and persons with disabilities, ECRCO has determined that BAAQMD's public participation policies are deficient and provide evidence that BAAQMD is failing to ensure meaningful access for persons with limited English proficiency and persons with disabilities as required by federal civil rights laws and EPA's nondiscrimination regulation. In 2016, ECRCO provided BAAQMD with technical assistance regarding its public participation plan.²¹⁶ Specifically, ECRCO highlighted that BAAQMD's public participation plan failed to mention any procedures addressing accessibility for individuals with disabilities.²¹⁷ Although BAAQMD acknowledged that its Public Participation Plan is a "living document" to be updated and changed as required to reflect community needs, according to its website, the document has not been revised since June 30, 2015.²¹⁸ BAAQMD's "accessibility" language in its Notice of Nondiscrimination is not an appropriate substitute for including explicit disability language in its Public Participation plan. As a "living document" a public participation plan should describe how the recipient will provide meaningful access to individuals with disabilities and, as highlighted above, BAAQMD's language on accessibility and accommodations in its Notice of Nondiscrimination document are lacking. Finally, one of the significant elements of Public Participation Plans is to ensure that recipients consider meaningful access in determining the appropriate time, place, location, duration, and security at public meetings are developed and applied in a non-discriminatory manner. BAAQMD's Public Participation document fails to discuss any of these factors, including how these factors will be considered to ensure meaningful access for persons with disabilities.

²¹⁴ 71 FR 14207, 14211.

²¹⁵ BAAQMD Public Participation Plan, available at https://www.baaqmd.gov/~media/files/communications-and-outreach/community-outreach/public-engagement/ppp_final_121713.pdf?la=en [hereinafter BAAQMD Public Participation Plan].

²¹⁶ EPA Complaint No. 02R-00-R9 Resolution Letter.

²¹⁷ EPA Complaint No. 02R-00-R9 Resolution Letter.

²¹⁸ BAAQMD Public Participation Plan.

Based on the above, ECRCO finds that BAAQMD is not ensuring that its public participation policies, processes, and practices are consistent with Title VI, Section 504, and EPA's implementing regulation at 40 C.F.R. at Part 7.²¹⁹

III. Summary of Preliminary Findings

As discussed above, ECRCO has concluded its investigation of both the first and second issues.²²⁰ With respect to the first issue, ECRCO has concluded that there is insufficient evidence to support a finding that BAAQMD discriminated against the Black residents of the Bayview Hunters Point Community on the basis of race in its response to Complainants air quality complaint. With respect to the second issue, ECRCO has determined that the preponderance of the evidence supports a conclusion that that BAAQMD failed to comply with some of its obligations under federal nondiscrimination laws and EPA's nondiscrimination regulation with respect to BAAQMD not having in place or implementing a nondiscrimination program, including: procedural safeguards required under 40 C.F.R. Parts 5 and 7; policies and procedures for ensuring meaningful access to BAAQMD's services, programs, and activities for individuals with LEP and individuals with disabilities; and a public participation program that ensures meaningful access to those proceedings to persons with limited-English proficiency and individuals with disabilities.²²¹

IV. Steps for Resolving Preliminary Findings of Noncompliance and Achieving Compliance

After ECRCO makes a preliminary finding of noncompliance, the administrative process for resolving the finding is set forth in 40 C.F.R. Part 7.115(d). The regulation provides that "(a)after receiving the notice of the preliminary finding of noncompliance in paragraph (c) of this section, the recipient may: (1) Agree to the OCR's recommendations, or (2) Submit a written response sufficient to demonstrate that the preliminary findings are incorrect, or that compliance may be achieved through steps other than those recommended by OCR." If BAAQMD does not take one of these actions within fifty (50) calendar days after receiving this preliminary notice, ECRCO will, within fourteen (14) calendar days, send a formal written determination of noncompliance to the recipient and copies to the Award Official and Assistant Attorney General.

²¹⁹ 71 FR 14207.

²²⁰ EPA Complaint No. 01R-21-R9 Acceptance letter.

²²¹ See Title VI, 42 U.S.C. 2000(d) *et seq.*; Section 504 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 794; *Lau v. Nichols*, 414 U.S. 563, 568-69 (1974) (finding that the government properly required language services to be provided under a recipient's Title VI obligations not to discriminate based on national origin); 40 C.F.R. § 7.35(a). See also U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons, 69 FR 35602 (June 25, 2004) (available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf); U.S. EPA, Title VI Public Involvement Guidance for EPA Assistance Recipients Administering Environmental Permitting Programs, 71 FR 14207 (March 21, 2006) (available at https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_public_involvement_guidance_for_epa_recipients_2006.03.21.pdf); U.S. EPA, Procedural Safeguards Checklist for Recipients, at https://www.epa.gov/sites/production/files/2020-02/documents/procedural_safeguards_checklist_for_recipients_2020.01.pdf (rev. Jan. 2020) (which provides a more detailed explanation of nondiscrimination obligations and best practices); U.S. EPA, Disability Nondiscrimination Plan Sample, at https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf. (2017).

ECRCO proposes to resolve these preliminary findings through a Voluntary Compliance Agreement²²² to address the deficiencies discussed in this letter. Following this letter, ECRCO will contact BAAQMD to discuss a Voluntary Compliance Agreement. In addition, ECRCO offers BAAQMD the opportunity to enter into an Informal Resolution Agreement that would allow ECRCO and BAAQMD to address collaboratively the remaining issue accepted for investigation, without findings of compliance or noncompliance.²²³

V. Recommendations for Achieving Voluntary Compliance

Pursuant to 40 C.F.R. § 7.115(c)(1)(ii), ECRCO makes the following recommendations to address the compliance deficiencies identified in this letter:

A. Notice of Non-Discrimination under the Federal Non-Discrimination Laws

1. BAAQMD will post a notice of non-Discrimination (Notice) on BAAQMD's website homepage, in all BAAQMD's offices and facilities, and in its general publications that are distributed to the public (*e.g.*, public outreach materials, such as brochures, notices, fact sheets or other information on rights and services; applications or forms to participate in or access BAAQMD programs, processes or activities). BAAQMD will ensure that its Notice is accessible to individuals with limited-English proficiency (LEP) in the appropriate language(s)²²⁴ and individuals with disabilities, including ensuring that the Notice posted on the BAAQMD Website Homepage is accessible to persons who are blind or have low vision, and for individuals with color vision impairment or color blindness.

The Notice will contain, at a minimum, the following recommended text:

- a. BAAQMD does not discriminate on the basis of race, color, national origin, disability, age, or sex in administration of its programs or activities, and BAAQMD does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights.
- b. [Insert name and title of non-discrimination coordinator] is responsible for coordination of compliance efforts and receipt of inquiries concerning non-discrimination requirements implemented by 40

²²² Case Resolution Manual (Jan. 2021) at Section 5.1 (https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf).

²²³ Case Resolution Manual (Jan. 2021) at Section 3.1 (https://www.epa.gov/sites/production/files/2021-01/documents/2021.1.5_final_case_resolution_manual_.pdf).

²²⁴ U.S. EPA, Guidance to Environmental Protection Agency Financial Assistance Recipients Regarding Title VI Prohibition Against National Origin Discrimination Affecting Limited English Proficient Persons. 69 FR 35602 (June 25, 2004) (https://www.epa.gov/sites/production/files/2020-02/documents/title_vi_lep_guidance_for_epa_recipients_2004.06.25.pdf) (Providing guidance in Section V(1): "the number or proportion of LEP persons from a particular language group served or encountered in the eligible service population.")

C.F.R. Parts 5 and 7 (Non-Discrimination in Programs or Activities Receiving Federal Assistance from the Environmental Protection Agency), including Title VI of the Civil Rights Act of 1964, as amended; Section 504 of the Rehabilitation Act of 1973; the Age Discrimination Act of 1975; Title IX of the Education Amendments of 1972; and Section 13 of the Federal Water Pollution Control Act Amendments of 1972 (hereinafter referred to collectively as the federal non-discrimination laws).

- c. If you have any questions about this notice or any of BAAQMD's non-discrimination programs, policies or procedures, you may contact:
- (Name)
 (Position)
 (Organization/Department)
 Bay Area Air Quality Management District
 375 Beale Street
 Suite 600
 San Francisco, CA 94105
 (Phone Number)
 (Email)

If you believe that you have been discriminated against with respect to a [Recipient Name] program or activity, you may contact the [insert title of non-discrimination coordinator] identified above or visit our website at [insert Recipient website address] to learn how and where to file a complaint of discrimination.

2. If the identity of the Non-Discrimination Coordinator changes, then BAAQMD will promptly update materials as appropriate.

B. Grievance Procedures to Process Discrimination Complaints filed under the Federal Non-Discrimination Laws

1. BAAQMD will post Grievance Procedures to promptly and fairly process and resolve discrimination complaints filed under federal non-discrimination statutes and the EPA's implementing regulations at 40 C.F.R. Parts 5 and 7 on the BAAQMD website homepage, in all BAAQMD's offices and facilities, and in its general publications as appropriate that are distributed to the public. BAAQMD will ensure that its Grievance Procedures are accessible to individuals with LEP in the appropriate language(s) and individuals with disabilities, including ensuring that the Notice as posted on its Website Homepage is accessible to individuals who are blind or have low vision, and for individuals with color vision impairment or color blindness.
2. The Grievance Procedures will:
 - a. Clearly identify the Non-Discrimination Coordinator, including name and contact information;
 - b. Explain the role of the Non-Discrimination Coordinator relative to the coordination and oversight of the Grievance Procedures;

- c. State who may file a complaint under the Grievance Procedures and describe the appropriate bases for filing a complaint;
- d. Describe which processes are available, and the options for complainants in pursuing either;
- e. Describe elements of the recipient's investigation process and provide timelines for: the submission of a discrimination complaint; the investigation's review, conclusion, or resolution process; or making an appeal of any final decision;
- f. State that the preponderance of the evidence standard will be applied during the analysis of the complaint;
- g. Contain assurances that intimidation and retaliation are prohibited and that claims of intimidation and retaliation will be handled promptly and fairly pursuant to your Grievance Procedures in the same manner as other claims of discrimination;
- h. Assure the prompt and fair resolution of complaints which allege violation of federal non-discrimination laws;
- i. State that written notice will be promptly provided about the outcome of the investigation, including whether discrimination is found and the description of the investigation process.
- j. Be reviewed on an annual basis (for both in-print and online materials), and revised as necessary, to ensure prompt and fair resolution of discrimination complaints.

3. BAAQMD will review and revise as necessary the Grievance Procedures on an annual basis to ensure prompt and fair resolution of discrimination complaints.

C. Designation of Non-Discrimination Coordinator

1. BAAQMD will designate at least one Non-Discrimination Coordinator to ensure compliance with the federal non-discrimination laws, who will:
 - a. Provide information to individuals internally and externally that BAAQMD does not discriminate on the basis of race, color, national origin, disability, age, or sex in the administration of the BAAQMD's programs or activities, and that the BAAQMD does not intimidate or retaliate against any individual or group because they have exercised their rights to participate in or oppose actions protected/prohibited by 40 C.F.R. Parts 5 and 7, or for the purpose of interfering with such rights;
 - b. Provide notice of the BAAQMD's grievance processes and the ability to file a discrimination complaint;
 - c. Establish a mechanism (e.g., an investigation manual) for implementation of the BAAQMD's Grievance Procedures to ensure that all discrimination complaints filed with the BAAQMD under federal non-discrimination laws and the EPA implementing regulations 40 C.F.R. Parts 5 and 7 are processed promptly and fairly. One element of any policy and procedure or mechanism must include providing meaningful access for individuals with limited English

- proficiency and individuals with disabilities to the BAAQMD's services, programs and activities;
- d. Track all complaints filed with the BAAQMD under federal non-discrimination laws, in order to identify any patterns or systemic problems;
 - e. Conduct semiannual reviews/analysis of all complaints filed with the BAAQMD under the federal non-discrimination laws identified within this Agreement, and/or any other discrimination complaints independently investigated by BAAQMD covering these laws, to identify and address any patterns, systematic problems or any trends identified;
 - f. Ensure that appropriate training is provided for BAAQMD staff in the processes available to resolve complaints filed with BAAQMD under federal non-discrimination laws;
 - g. Ensure that appropriate training is provided for BAAQMD staff on BAAQMD's non-discrimination policies and procedures, as well as the nature of BAAQMD's obligation to comply with federal non-discrimination laws;
 - h. Ensure that complainants are updated on the progress of their complaints filed with BAAQMD under federal non-discrimination laws and are promptly informed as to any determinations BAAQMD has made;
 - i. Undertake periodic evaluations of the efficacy of BAAQMD's efforts to provide services, aids, benefits, and participation in any of BAAQMD's programs or activities without regard to race, color, national origin, disability, age, sex or prior exercise of rights or opposition to actions protected under federal non-discrimination laws.
2. The Non-Discrimination Coordinator will not have other responsibilities that create a conflict of interest (*e.g.*, serving as the BAAQMD Non-Discrimination Coordinator as well as its legal advisor or representative on civil rights issues).
 3. BAAQMD will identify, by name and position, at least one individual who will serve as Non-Discrimination Coordinator(s) consistent with the regulatory requirements of 40 C.F.R. §5.135, §7.85(g), and §7.95(a).
- D. BAAQMD Plan to Ensure Meaningful Access to Programs and Activities for Persons with Limited English Proficiency (LEP)
1. BAAQMD will conduct an appropriate analysis as described in EPA's LEP Guidance found at 69 F.R. 35602 (June 25, 2004)²²⁵, to identify the appropriate language groups and determine what language services or mix of language services BAAQMD needs to provide (*e.g.*, interpreters and translators), to ensure that limited-English proficient individuals can meaningfully participate in BAAQMD's services, programs and activities.

²²⁵ <https://www.govinfo.gov/content/pkg/FR-2004-06-25/pdf/04-14464.pdf>.

2. BAAQMD will develop, publicize, and implement written procedures (a Language Access Plan) to ensure meaningful access to all BAAQMD services, programs and activities for individuals with LEP, at no cost to those individuals.

E. BAAQMD Plan to Ensure Meaningful Access to Programs and Activities for Persons with Disabilities

1. BAAQMD will develop, publicize, and implement a Disability Access Plan to ensure meaningful access to all BAAQMD programs, services, and activities for individuals with disabilities.²²⁶
2. BAAQMD will provide, at no cost, auxiliary aids and services to individuals with disabilities, (including, but not limited to, for example, qualified interpreters to individuals who are deaf or hard of hearing, and to other individuals, as necessary), to ensure effective communication and an equal opportunity to participate fully in benefits, activities, programs, and services provided by BAAQMD in a timely manner in such a way as to protect the privacy and independence of the individual.
3. BAAQMD will ensure that its facilities and other facilities utilized by BAAQMD (*e.g.* if BAAQMD holds a public hearing at a school or recreational center) are physically accessible to, individuals with disabilities.

F. Training

1. BAAQMD will ensure that all its employees and contractors have been appropriately trained on federal non-discrimination obligations and all plans, policies and procedures created and implemented as part of this letter. BAAQMD may request assistance from EPA for any of the training required in this letter.
2. BAAQMD will forward to EPA for review a draft plan for ensuring that such training is a routine part of the on-boarding process for new employees and contractors and is given regularly as refresher training to all employees and contractors.

This letter sets forth ECRCO's preliminary findings in EPA Complaint No. 01R-21-R9. This letter is not a formal statement of ECRCO policy and should not be relied upon, cited, or construed as such. This letter and any findings herein do not affect BAAQMD's continuing responsibility to comply with Title VI or other federal non-discrimination laws and EPA's regulations at 40 CFR Parts 5 and 7, nor do they affect EPA's investigation of any Title VI or other federal civil rights complaints or address any other matter not addressed in this letter.

If you have questions about this letter please feel free to contact me at (202)564-9649, by email

²²⁶ See Disability Nondiscrimination Plan Sample, at https://www.epa.gov/sites/production/files/2020-02/documents/disability_nondiscrimination_plan_sample_for_recipients_2020.01.pdf

at dorka.lilian@epa.gov, or Zahra Khan, Case Manager, at (202)564-0460, by email at khan.zahra@epa.gov.

Sincerely,



Lilian S. Dorka, Director
External Civil Rights Compliance Office
Office of General Counsel

cc:

Angelia Talbert-Duarte
Associate General Counsel
Civil Rights & Finance Law Office

Deborah Jordan
Deputy Civil Rights Official
US EPA Region 9

Gretchen Busterud
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